No. 16-1435	
Title:	**Minnesota Voters Alliance, et al., Petitioners** **v.** **Joe Mansky, et al.**
Docketed:	June 2, 2017
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Numbers:	(15-1682, 15-1741)
Decision Date:	February 28, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
May 30 2017	Petition for a writ of certiorari filed. (Response due July 3, 2017)
May 30 2017	Letter pursuant to Rule 12.6 from counsel for petitioners received.
Jun 08 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioners.
Jun 12 2017	Waiver of right of respondent Steve Simon, in his official capacity as Minnesota Secretary of State to respond filed.
Jun 15 2017	Waiver of right of respondent Joe Mansky, et al. to respond filed.
Jul 03 2017	Motion for leave to file amici brief filed by Cato Institute, et al.
Jul 03 2017	Motion for leave to file amicus brief filed by Center for Competitive Politics.
Jul 03 2017	Motion for leave to file amici brief filed by The American Civil Rights Union, et al.
Jul 19 2017	DISTRIBUTED for Conference of September 25, 2017.
Aug 04 2017	Response Requested. (Due September 5, 2017)
Sep 01 2017	Brief of respondents Joe Mansky, et al. in opposition filed.

Sep 14 2017	Reply of petitioners Minnesota Voters Alliance, et al. filed.
Sep 20 2017	DISTRIBUTED for Conference of 10/6/2017.
Oct 10 2017	DISTRIBUTED for Conference of 10/13/2017.
Oct 23 2017	DISTRIBUTED for Conference of 10/27/2017.
Oct 30 2017	DISTRIBUTED for Conference of 11/3/2017.
Nov 06 2017	DISTRIBUTED for Conference of 11/9/2017.
Nov 13 2017	Motion for leave to file amici brief filed by Cato Institute, et al. GRANTED.
Nov 13 2017	Motion for leave to file amici brief filed by The American Civil Rights Union, et al. GRANTED.
Nov 13 2017	Motion for leave to file amicus brief filed by Center fo Competitive Politics GRANTED.
Nov 13 2017	Petition GRANTED.
Nov 27 2017	Motion for an extension of time filed. **Main Document**
Nov 27 2017	Blanket Consent filed by Petitioners, Minnesota Voters Alliance, et al. **Blanket Consent**
Nov 29 2017	Motion to extend the time to file the joint appendix and petitioners' brief on the merits granted and the time is extended to and including January 5, 2018.
Dec 07 2017	Blanket Consent filed by Respondent, Joe Mansky, et al. **Blanket Consent**
Dec 20 2017	SET FOR ARGUMENT ON Wednesday, February 28, 2018
Jan 05 2018	CIRCULATED
Jan 05 2018	Brief of petitioners Minnesota Voters Alliance, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Jan 05 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
Jan 10 2018	Record requested from the U.S.C.A. 8th Circuit.
Jan 10 2018	Brief amicus curiae of Goldwater Institute filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 11 2018	Brief amici curiae of Justice and Freedom Fund filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 11 2018	Brief amici curiae of Cato Institute, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 11 2018	Brief amicus curiae of James Madison Center for Free Speech, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 12 2018	Brief amici curiae of Southeastern Legal Foundation, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 12 2018	Brief amici curiae of The American Civil Rights Union, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 12 2018	Brief amicus curiae of Institute for Free Speech filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 12 2018	Brief amici curiae of American Civil Liberties Union; American Civil Liberties Union of Minnesota filed. (Distributed) **Main Document** **Main Document** **Main Document**
Jan 17 2018	Record received from the U.S.C.A. 8th Circuit. (1 Box).
Feb 05 2018	Brief of respondents Joe Mansky, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2018	Brief amici curiae of Brennan Center for Justice at NYU School of Law, The League of Women Voters of the United States and The League of Women Voters Minnesota filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Feb 12 2018	Brief amicus curiae of Campaign Legal Center filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2018	Brief amici curiae of National Association of Counties, National League of Cities,

	U.S. Conference of Mayors, International City/County Management Association, and International Municipal Lawyers Association filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2018	Brief amici curiae of States of Tennessee, Indiana, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, Rhode Island, Texas, and Utah filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 19 2018	Reply of petitioners Minnesota Voters Alliance, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 28 2018	Argued. For petitioners: J. David Breemer, Sacramento, Cal. For respondents: Daniel Rogan, Assistant Hennepin County Attorney, Minneapolis, Minn.

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RECORD
AND
BRIEFS

No. 16-1435

Supreme Court, U.S.
FILED
MAY 30 2017
OFFICE OF THE CLERK

In the
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, et al.,
Petitioners,

v.

JOE MANSKY, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Minnesota election law forbids voters from wearing political badges, political buttons, or other political insignia at the polling place. *See* Minn. Stat. § 211B.11. The ban broadly prohibits any material "designed to influence and impact voting," or "promoting a group with recognizable political views," even when the apparel makes no reference to any issue or candidate on the ballot.

The Eighth Circuit, aligned with the Fifth and D.C. Circuits, invoked *Burson v. Freeman*, 504 U.S. 191 (1992), to hold that a state can impose a "speech-free zone" without infringing on the Free Speech Clause of the First Amendment. There is deep tension between those decisions and the reasoning in decisions of the Fourth and Seventh Circuits, which hold that the First Amendment does not allow a state to prohibit all political speech.

The question presented is: Is Minnesota Statute Section 211B.11, which broadly bans all political apparel at the polling place, facially overbroad under the First Amendment?

LIST OF ALL PARTIES

Petitioners are Minnesota Voters Alliance, Andrew E. Cilek, and Susan Jeffers. All were plaintiffs in the courts below. Three other organizations, Minnesota Majority, Minnesota North Star Tea Party Patriots, Election Integrity Watch, which are no longer active, and one individual, Dan McGrath, were also plaintiffs below. Petitioners sent notices required by Supreme Court Rule 12.6 to Minnesota Majority, Minnesota North Star Tea Party Patriots, Election Integrity Watch, and Dan McGrath. Respondents are Joe Mansky, in his official capacity as the Elections Manager for Ramsey County; Virginia Gelms, in her official capacity as the Elections Manager for Hennepin County; Mike Freeman, in his official capacity as Hennepin County Attorney; John Choi, in his official capacity as Ramsey County Attorney; and Steve Simon, in his official capacity as Secretary of State. All were defendants in the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Minnesota Voters Alliance is a nonprofit 501(c)(4) corporation incorporated under the laws of Minnesota. Minnesota Voters Alliance has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Minnesota Voters Alliance, Andrew E. Cilek, and Susan Jeffers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit affirming final judgment against Petitioners is reported at 849 F.3d 749 (8th Cir. 2017), and reprinted in Appendix A. The related opinion of the district court rejecting Petitioners' as-applied challenge and entering final judgment is unreported, but may be found at 0:10-cv-04401-JNE-SER, ECF No. 167 (D. Minn. Mar. 23, 2015), and is reprinted in Appendix B. An interim order of the district court, granting Defendant Mark Ritchie's motion for summary judgment in part, and denying the motion in part, is reported at 62 F. Supp. 3d 870 (2014), and reprinted in Appendix C. The Eighth Circuit's opinion rejecting Petitioners' facial challenge is reported at 708 F.3d 1051 (8th Cir. 2013), and reprinted in Appendix D. The Eighth Circuit's denial of rehearing en banc, over the dissent of Judge Smith and Judge Shepherd, on May 7, 2013, is reprinted in Appendix F. The district court opinion rejecting the facial challenge is reported at 789 F. Supp. 2d 1112 (D. Minn. 2011), and reprinted in Appendix E.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered final judgment in this case on February 28, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTITIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment, as incorporated against the states by the Fourteenth Amendment, provides that the states "shall make no law . . . abridging the freedom of speech."

Minnesota Statute Section 211B.11 provides, in relevant part: "A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."

STATEMENT OF THE CASE

This case presents an important and frequently recurring question of law: Does a statute that creates a "speech-free zone" at the polling place violate the First Amendment? Minnesota Statute Section 211B.11 forbids voters from wearing any kind of "political badge, political button, or other political insignia" at "the polling place on primary [and] election day." Minnesota defines "political" as "[i]ssue oriented material designed to influence or impact voting" and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." App. I-1–I-2. Petitioner Andrew Cilek, a Minnesota voter, was temporarily prevented from voting for wearing two items of political apparel: A t-shirt that states "Don't Tread on Me," with a picture of the Gadsden Flag and a small Tea Party logo; and an Election Integrity Watch

(EIW)[1] button that states "Please I.D. Me" with EIW's website and phone number. App. G-1, H-1–H-2.

The Eighth Circuit upheld the Minnesota law, holding that it did not violate the overbreadth doctrine of the First Amendment. App. D. The decision below aligns with the D.C. Circuit and the Fifth Circuit to hold that the government has *carte blanche* to ban political speech near polling places. By contrast, the Fourth and Seventh Circuits recognize that, regardless of location, a total ban on all speech the government deems "political," without any limiting principle, violates the First Amendment's overbreadth doctrine. The reasoning of those decisions would plainly invalidate the political apparel ban here. Moreover, the Oregon Court of Appeals and United States District Court for the District of Arizona have invalidated nearly identical laws as inconsistent with voters' free speech rights.

Resolution of the question presented is a matter of tremendous nationwide importance. Nine other states have nearly identical political apparel bans, *see infra* n.10, and Respondents candidly acknowledge that every state in the Union has created "speech-free zones."

"Speech-free zones" cannot be reconciled with the First Amendment's Free Speech Clause. Although this Court has permitted *campaign*-free zones that prohibit campaign materials and active solicitation, *see Burson*, 504 U.S. at 193-94, it has never endorsed a ban on all political speech. Instead, under this

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[1] EIW was a joint project of three nonprofits: Minnesota Voters Alliance, Minnesota Majority, and North Star Tea Party Patriots. It is now defunct.

Court's precedents, a "virtual First Amendment Free Zone" in any forum, public or nonpublic, plainly violates the First Amendment. *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

A. Factual Background

Minnesota Election Code Chapter 211B prescribes a set of "Fair Campaign Practices," such as disclaimers on campaign literature, Minn. Stat. § 211B.04, and limits on corporate political contributions, Minn. Stat. § 211B.15. Section 211B.11, entitled "Election day prohibitions," bans various activities "near polling places." As relevant here, the third sentence of the statute provides that "[a] political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." *Id.*, subd. 1. Voters who violate this law are subject to the criminal penalties assessed for a petty misdemeanor, Minn. Stat. § 211B.11, subd. 4, and civil penalties of up to $5,000. Minn. Stat. § 211B.35, subd. 2(d).

Because the text of the statute itself does not define "political," Minnesota election officials, including the Secretary of State, the Ramsey County Election Manager, and the Hennepin County Election Manager, distributed an Election Day Policy in 2010 to help election judges make this determination. App. I. The Policy bans not only campaign-related material that advocates for the election of a candidate or the passage of a ballot initiative, but also "[i]ssue oriented material designed to influence and impact voting (including specifically the 'Please I.D. Me' buttons)" and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.Org, and so on)." App. I-1–I-2. Election

judges enforcing the Policy, including Petitioner Susan Jeffers, were instructed to allow perceived violators to vote, but also to record their names and addresses for potential prosecution. App. I-2–I-3.

Petitioner Andrew Cilek is a registered voter and Executive Director of the Minnesota Voters Alliance, a 501(c)(4) organization that seeks better government through election reforms. App. D-2, E-2–E-3. Just before the November 2010 election, Minnesota Voters Alliance joined forces with North Star Tea Party Patriots and Minnesota Majority to form Election Integrity Watch (EIW), "a grass roots effort to protect election integrity." App. E-16. None of these 501(c)(4) organizations "endorse[d] a candidate or ballot issue in the November 2010 Election." App. D-2, E-2–E-3. EIW produced a button that stated "Please I.D. Me" and included an image of a human eye, along with EIW's telephone number and website address. App. D-2.

During the November 2010 election, Cilek entered his polling place in Hennepin County wearing a "Please I.D. Me" button and a t-shirt made by the North Star Tea Party Patriots. The t-shirt featured a relatively small Tea Party logo alongside the shirt's primary message, "Don't Tread on Me," and an image of the Gadsden Flag. App. H-1 (exhibit of prohibited Tea Party shirts). An election worker twice refused to allow Cilek to vote because these items are prohibited by Minnesota Statute Section 211B.11. *See* App. E-7.

B. Procedural History

Shortly after the November 2010 election, Petitioners filed their First Amended Complaint, alleging that Minnesota Statute Section 211B.11, both

on its face and as-applied to Petitioners, violated the First Amendment. As relevant here, Petitioners objected that the ban on all "political" apparel, including Tea Party t-shirts and "Please I.D. Me" buttons, was substantially overbroad under the First Amendment.[2] Petitioners sought declaratory and injunctive relief against various state officials who prevented eligible voters from wearing buttons or clothing that did not endorse candidates or ballot questions in the polling place on Election Day. App. A-4–A-5.

The district court dismissed the case. The court acknowledged that the organizational plaintiffs, such as the North Star Tea Party Patriots and Election Integrity Watch, "do not endorse candidates" App. E-3. It also noted that with respect to the "Please I.D. Me" buttons, "there was no issue relating to voter identification on the November 2, 2010 ballot." App. E-3–E-4. Yet the district court, citing this Court's decision in *Burson v. Freeman* and the D.C. Circuit's decision in *Marlin v. D.C. Bd. of Election & Ethics*, 236 F.3d 716 (D.C. Cir. 2001), upheld Minnesota's political apparel ban. App. E-11–E-14, E-16–E-18, E-22–E-24, E-29. Addressing Petitioners' facial overbreadth argument, the court, relying on *Marlin*, concluded that a ban on apparel "expressing political ideology or beliefs, even those unrelated to a candidate or a ballot question," falls "within the [statute's] legitimate sweep." App. E-29.

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[2] Besides Cilek's Gadsden Flag shirt, many other t-shirts were banned under Minnesota Statute Section 211B.11, including shirts with slogans such as "liberty," "Tea Party Patriots," or a picture of a Tea Party shield. *See* App. B-24–B-25.

On appeal, the government embraced the State's broad ban on "political" apparel. Dispelling any notion that Minnesota's ban was limited to the insignia at issue in this case, the government conceded that the statute also reaches the apparel of other organizations, such as the Chamber of Commerce and the AFL-CIO. Oral Argument at 19:48, *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (No. 11-2125).[3]

In a split decision, the Eighth Circuit upheld the ban against Petitioners' facial claim.[4] App. D. Relying on *Burson* and decisions of the D.C. Circuit, Fifth Circuit, and Eleventh Circuit, the panel held that even though the apparel did not belong to a "political party" or "endorse[] a candidate or ballot issue," a blanket ban on such apparel was nonetheless a constitutional means to further the government's interest in maintaining "peace, order, and decorum" at the polling place. App. D-2, D-8 (internal quotations omitted). Indeed, the panel suggested that even a "total ban on politicking," including "buttons and T-Shirts" within a 600-foot radius of the polling place would pose no constitutional problem. App. D-10. (citing *Schirmer v. Edwards*, 2 F.3d 117, 122-23 (5th Cir. 1993)).

Judge Shepherd, dissenting in relevant part, objected to the majority's sweeping conclusion that a categorical ban on all political insignia is "reasonable in light of the need to maintain 'peace, order and decorum,' to 'protect[ ] voters from confusion and

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[3] http://media-oa.ca8.uscourts.gov/OAaudio/2012/2/112125.MP3.

[4] The Eighth Circuit Court reversed the district court's order dismissing the Petitioners' as-applied claim and remanded that claim to the district court. App. D-11–D-12.

undue influence,' and to 'preserv[e] the integrity of its election process' in the polling place." App. D-15 (alterations in original). He explained that *Burson* does not justify a ban on *all* political insignia in the polling place because this Court explicitly limited its holding to political insignia that endorsed either a candidate or a ballot issue in the election. App. D-16–D-17 (noting that the law in *Burson* banned only "the display of *campaign* posters, signs, or other *campaign* materials, distribution of *campaign* materials, and the solicitation of votes for or against any person or political party or position"). Finally, Judge Shepherd was considerably less sanguine about the implications of the panel's decision, observing that he simply could "not accept" the government's insistence that "the presence of a passive and peaceful voter who happens to wear a shirt displaying" merely the name of an organization, such as "'American Legion,' 'Veterans of Foreign Wars,' 'AFL-CIO,' 'NRA,' 'NAACP,' or the logo of one of these organizations (all of which have actively participated in the political process) somehow causes a disruption in the polling place or confuses or unduly influences voters." App. D-18 n.7.

Petitioners filed a petition for a writ of certiorari, arguing that the Minnesota statute is overbroad and has the effect of chilling protected speech. Petition for Writ of Certiorari, *Minnesota Majority v. Mansky*, 134 S. Ct. 824 (2013) (No. 13-185). After this Court called for a response, the State opposed certiorari, principally on the ground that "review of Petitioners' facial challenge [was] not appropriate because Petitioners' as-applied challenge [was] still pending." Opposition to Petition for Writ of Certiorari at 1, 9. The Court denied certiorari and the case proceeded in district court. On February 28, 2017, the Eighth

Circuit rejected Petitioners' as-applied challenge. This Petition, limited to the facial overbreadth claim, follows.

REASONS FOR GRANTING THE PETITION

This case presents the question of whether government may impose a blanket ban of all speech that it deems "political." In conflict with the reasoning of the Fourth Circuit and the Seventh Circuit; and the holdings of the Oregon Court of Appeals and the United States District Court for the District of Arizona; but in agreement with the D.C. Circuit and the Fifth Circuit, the Eighth Circuit held that speech-free zones raise no free speech problems.

The decision below should not stand. In *Burson v. Freeman*, this Court upheld a Tennessee statute that banned the "solicitation of votes" and "*campaign* materials" within 100 feet of the polling place. *Burson*, 504 U.S. at 193-94 (emphasis added). Although the Eighth Circuit joined the Fifth and D.C. Circuits in extending this Court's decision in *Burson* to ban passive political speech unrelated to candidates or ballot initiatives, *Burson* plainly does not endorse a categorical ban on *all* types of "political" speech.

Instead, a law is unconstitutionally overbroad if it punishes a substantial amount of protected free speech, judged in relation to the amount of speech that the government may legitimately curtail. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). The decision below departs from this Court's precedent on First Amendment overbreadth and effectively chills the free speech rights of millions of voters across the country by threatening criminal prosecution or civil penalties for voters who wear logoed t-shirts, caps, jackets,

buttons, and other apparel in state-declared speech-free zones.

I

THERE IS DEEP TENSION AMONG THE LOWER COURTS ON THE QUESTION OF WHETHER THE GOVERNMENT MAY IMPOSE A BLANKET BAN ON ALL POLITICAL SPEECH

The lower courts disagree on the issue presented: Does the First Amendment's Free Speech Clause permit the government to create categorical speech-free zones at the polling place?[5] In *Burson v. Freeman*, this Court endorsed a ban on campaign-related speech at the polling place. *Burson*, 504 U.S. at 193. Yet, although *Burson* upheld only some election-specific limits on speech, some states have read the decision as an unqualified mandate to ban all speech under the guise of regulating elections. This Court's guidance on this matter would thus clarify the bounds between election law and the First Amendment for voters nationwide.

A. The D.C. Circuit and the Fifth Circuit Share the Eighth Circuit's Expansive View of the Government's Power to Ban Speech

The Eighth Circuit expressly relied on the D.C. Circuit's decision in *Marlin v. D.C. Bd. of Elections and Ethics*, 236 F.3d 716, to uphold Minnesota's political apparel ban. In *Marlin*, the D.C. Circuit considered a District of Columbia regulation

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[5] The First Amendment has been incorporated against the states by Section 5 of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

providing that "no partisan or nonpartisan political activity . . . shall be permitted in, on, or within a reasonable distance outside the building used as a polling or vote counting place." *Id.* at 718. Like Minnesota's political apparel ban, the District's election regulation in *Marlin* defined "political activity" to "include without limitation, any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." *Id.* (citing 3 D.C.M.R. § 708.8).

The D.C. Circuit upheld the statute, reasoning that because a polling place was a nonpublic forum, it need not be "available for general public discourse *of any sort*." *Id.* at 719 (emphasis added). Relying on *Burson*, the court reasoned that a speech ban comports with the First Amendment as long as "the only expressive activity" it allows is "carried out privately—by secret ballot in a restricted space." *Id.* The D.C. Circuit hastily concluded that the District's ban was a reasonable means by which to further governmental interests in orderly voting, and in boilerplate fashion, recited that even if "narrower regulations might be as effective or more so," that does "not invalidate the means the District has chosen." *Id.* at 720.[6]

The Fifth Circuit also countenances speech-free zones near polling places. In *Schirmer v. Edwards*,

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[6] *Marlin* involved an as-applied challenge, but the D.C. Circuit found no constitutionally significant distinction between as-applied and facial challenges in analyzing whether a political speech ban is reasonable. *Marlin*, 236 F.3d at 720 n.5. The *Marlin* court's reasoning would uphold the Minnesota political apparel ban in this case. *Id.* at 719 (government is permitted to create forum in which the "only expressive activity" is voting).

2 F.3d 117 (5th Cir. 1993), the court upheld a Louisiana statute that imposed a "total ban on politicking," including "buttons and T-Shirts," within a 600-foot radius of the polling place. *Id.* at 122-23 (citing Louisiana statute that makes it illegal to "place or display political signs, pictures, or other forms of political advertising"). The *Schirmer* plaintiffs alleged that the Louisiana statute was facially overbroad because it banned both political speech concerning individuals not on the ballot and passive political speech such as buttons and t-shirts that carried no campaign-related message. *Id.* at 122. Although the Fifth Circuit recognized that the ban "singles out and sanctions public discourse on politics—an area deep within the confines of the First Amendment," *id.* at 120, it believed that voters must "compromise" their First Amendment rights to free speech so that the State can create "an environment free from intimidation, harassment, confusion, obstruction, and undue influence." *Id.* at 119.

Like the D.C. Circuit, the Fifth Circuit relied on *Burson* in upholding the Louisiana ban. The court noted that "the only known reference [in *Burson*] with regard to proscribing non-ballot campaigning around polling areas" came from isolated statements in Justice Stevens's dissent. Yet the Fifth Circuit believed that those statements suggested that this Court "would be more comfortable with an across the board ban on politicking in the campaign-free zone" to prevent "on-the-spot enforcement decisions about what was proscribed by the statute" and the need for "increased security . . . to weed out those engaged in ballot related speech." *Id.* at 123. In all, the Fifth Circuit concluded that a "total ban on politicking" was the "most defensible position" the State could adopt,

and one that "demonstrate[d] a reasonable compromise" between free speech rights and the State's interests in speech-free zones. *Id.* at 123-24.[7]

B. The Fourth Circuit and the Seventh Circuit Hold That a Complete Ban on Political Speech Cannot Be Reconciled with the First Amendment

In tension with the reasoning of decisions by the D.C. Circuit, Fifth Circuit, and Eighth Circuit, two circuit courts hold that a broad ban on political speech cannot be reconciled with the First Amendment. In invalidating state electioneering statutes, the Fourth and Seventh Circuits relied on this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), just as seven members of the Court did in *Burson*. *See Burson*, 504 U.S. at 206-07 (plurality opinion); *id.* at 217 (Stevens, J., dissenting).

The Fourth Circuit held that an unlimited ban on political speech was substantially overbroad under the First Amendment. In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the court invalidated two provisions of the North Carolina election code that subjected groups which neither supported nor opposed candidates for office to an intrusive set of reporting requirements. *Id.* at 712-13. The Fourth Circuit held that the statute was overbroad because it "blanket[ed] with uncertainty" the entire field of campaign politics, thereby

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[7] The Eighth Circuit also suggested that the Eleventh Circuit's decision in *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1218-19 (11th Cir. 2009), endorsed the outcome below. While *Browning* may be distinguishable on the ground that it involved solicitation, if the Eighth Circuit is correct, it would only add to the tension among the lower courts.

"compel[ling] the speaker to hedge and trim." *Id.* at 713 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). It added that a law so severely burdening political speech was "unacceptable in an area of such crucial import to our representative democracy." *Id.* The same can be said of Minnesota's political apparel ban.

The Fourth Circuit also examined a statute that prohibited corporate expenditures or contributions for a "political purpose." *Id.* The court noted that although this Court permits "[r]egulation of corporate political activity," that jurisprudence reflects concern about "the potential for unfair deployment of wealth for political purposes," a concern that is "not omnipresent." *Id.* Rather than simply "reiterating [a] general concern," *id.*, the Fourth Circuit conducted a more nuanced analysis and held that by making "no exception for nonprofits that present a minimal risk of distorting the political process," the statute was substantially overbroad under the First Amendment. *Id.* at 714.

The Seventh Circuit reached a similar result in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). In that case, Wisconsin election laws defined "political purpose" as the "*purpose of influencing the election or nomination*" of any individual, and a "political committee" as "every committee which is formed primarily to *influence elections*." *Id.* at 833. The court regarded the "influence an election" language as the kind of "broad and imprecise language" that "risk[s] chilling" protected speech, and noted that a narrowing construction of the statute was required to cure

"persistent [ ] overbreadth" and conform the law with the First Amendment. *Id.*

The circuit courts are thus in tension on an issue of nationwide importance. Because the cases above lack any constitutionally significant difference, the lower courts cannot "create harmony" on the question presented. *See Bauer v. Shepard*, 620 F.3d 704, 710 (7th Cir. 2010).

C. The Oregon Court of Appeals and the United States District Court for the District of Arizona Have Invalidated Bans on Passive Political Speech at the Polling Place

Two other courts have invalidated statutes virtually identical to Minnesota Statute Section 211B.11 on grounds that such statutes are inconsistent with the right to free speech. In *Reed v. Purcell*, No. 10-CV-2324, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010), a federal district court in Arizona entered a temporary restraining order enjoining Arizona's political apparel ban. That ban specified that "no political or electioneering materials may be displayed within" seventy-five feet of a polling place. *Id.* at *1 (citing Ariz. Rev. Stat. § 16-515). Mark Reed, an Arizona voter, sought to vote in the State's 2010 election while wearing a t-shirt that stated "Tea Party: Principles Not Politicians," with the insignia "Don't Tread on Me." *Id.* An Arizona Elections Director instructed poll workers to require anyone wearing a "Tea Party" t-shirt to remove or cover the shirt before voting, despite the fact that the "Tea Party" was not recognized as a political party in Arizona and did not appear on the ballot. *Id.*

Reed moved for a temporary restraining order, alleging that Arizona's political apparel law "infringe[d] on [his] First Amendment rights by prohibiting [him] from voting while wearing a 'tea party' t-shirt." *Id.* Although the court did not explicitly enjoin the law on overbreadth grounds, it plainly conducted the same analysis that courts conduct in overbreadth cases. *See id.* at *4. For instance, the court was troubled by enforcement of Arizona's political apparel ban against voters who wear shirts that make "no mention of express support or opposition of any candidate on the ballot, party on the ballot, or proposition on the ballot." *Id.* The court prohibited the State from enforcing the statute because it could not "derive any clear standard from [ ] a case-by-case adjudication" of which shirts could be banned as "political" apparel. *Id.* Finally, the court expressed concern that the broad discretion given to election officials under Arizona's political apparel ban "chills protected First Amendment expression." *Id.* After all, "[m]essages pertinent to the election can be found everywhere if one looks hard enough," and even "a red and blue t-shirt may be prohibited because of the association of the color with the two major [political] parties." *Id.* The court granted the plaintiff's motion for a temporary restraining order. *See id.* at *5-6. Petitioners in this case could have worn a Tea Party t-shirt to the polling place if they lived in Arizona. The only reason they could not do so in Minnesota is because they lived on the other side of the conflict.

The Oregon Court of Appeals reached a similar result in *Picray v. Secretary of State*, 140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997). There, the court overturned a penalty imposed

under an Oregon statute that prohibited voters from wearing "political badge(s), button(s) or other insignia in polling places." *Id.* at 594 (citing Or. Rev. Stat. § 260.695(4)). The petitioner appeared at a polling place wearing two buttons, each approximately two inches in diameter, that criticized the Oregon Citizens Alliance, a major proponent of a ballot initiative. *Id.* Petitioner appealed after the State levied a $100 fine against him for violating Oregon's political apparel ban. *Id.* The Oregon court was asked to reconcile the Oregon Constitution's protection for free expression, *see* Or. Const. art. I, § 8,[8] and the State's role in regulating elections, just as federal courts must reconcile the First Amendment's protections for free speech and a state's role in regulating elections.

In reversing the fine, the court of appeals noted that the mere passive display of a political button or badge in a polling place constitutes "the silent expression of political opinion" and does not coerce or unduly influence anyone. *Picray*, 140 Or. App. at 600. While acknowledging the legislative prerogative in protecting voters from "undue influence" and "improper conduct," the court noted that both "are terms of constitutional limitation" and that the legislature cannot claim "absolute authority to prohibit any and all conduct relating to elections." *Id.* at 601. Referencing the historical approval of passive political speech, from "medalets, thread boxes, and bandanas promoting Andrew Jackson or John Quincy Adams in 1828 through [modern buttons and] bumper stickers[,]" the court held that the Oregon political apparel ban exceeded this constitutional limitation.

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[8] The Oregon Constitution provides that "No law shall be passed restraining the free expression of opinion . . . ."

Id. at 601 n.12 (citing Roger A. Fischer, *Tippecanoe and Trinkets Too* vii-viii (1988)). Petitioners in this case plainly could have voted with their t-shirts and buttons without issue if they had been residents of Oregon, but because they lived in Minnesota they could not.

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Laws are overbroad and thus unconstitutional under the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). As this Court has explained, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate [ ] only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). If it were otherwise, a series of cases challenging specific applications of a law would result in a "chilling effect . . . on protected speech" during the proceedings. *Jews for Jesus*, 482 U.S. at 576.

"The first step in overbreadth analysis is to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). Here, the statute prohibits voters from wearing "political badge[s], political button[s], or other political insignia" at "the polling place on primary or election day." Minn. Stat. § 211B.11. The Election Day Policy clarifies that Minnesota's sweeping ban covers "[i]ssue oriented material designed to influence or impact voting" and

"[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." The government conceded that the statute reaches apparel displaying logos from groups like the Chamber of Commerce and the AFL-CIO. And Judge Shepherd's dissent below (unanswered by either the panel or the Respondents) observed that the statute would apply to badges, buttons, or other insignia of the American Legion, Veterans of Foreign Wars, AFL-CIO, National Rifle Association, and the NAACP. App. D-18 n.7.[9]

As a result, Minnesota Statute Section 211B.11 creates a zone in which "the only expressive activity" permitted is "carried out privately—by secret ballot in a restricted space." *Marlin*, 236 F.3d at 719. Or, in this Court's parlance, a "virtual First Amendment Free Zone." *Jews for Jesus*, 482 U.S. at 574 (internal quotation marks omitted). "[B]ecause no conceivable governmental interest" could justify "such an absolute prohibition on speech," *id.* at 575, this Court may invalidate Minnesota's sweeping speech ban on overbreadth grounds regardless of whether the forum is public or nonpublic. *See id.* at 573-74.

Even if a polling place is a nonpublic forum, Minnesota Statute Section 211B.11 is still unconstitutionally overbroad. Speech restrictions in a nonpublic forum must be "reasonable in light of the

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[9] Respondents have never argued that there is some "principled manner by which to narrow the plainly overbroad language." *See Florida Comm. for Liability Reform v. McMillan*, 682 F. Supp. 1536, 1540-41 (M.D. Fla. 1988) (enjoining a statute that forbids "soliciting or attempting to solicit any" opinion "for any purpose" despite defendants' contention that taking the plain text at face value would be "silly").

purpose which the forum at issue serves." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Thus, Minnesota Statute Section 211B.11 must be "consistent with" a "legitimate [governmental] interest[]" or ruled unconstitutional. *Id.* at 50. Throughout this litigation, Respondents have produced no more than conclusory statements that a ban on all political badges, buttons, and insignia furthers Minnesota's interest in conducting orderly elections.

What is more, the statute often requires election officials to rely on their own subjective judgments about whether certain apparel falls within the ambit of the law's ban on "political" speech. *See* Oral Arg. at 19:48 (No. 11-2125) (government's concessions that the statute bans political apparel from groups beyond those explicitly named in the Election Day Policy). Where an election official's subjective view might often diverge from the "objective meaning a third-party may ascribe" to apparel, a court will invalidate a statute—even under the reasonableness standard. *See Byrne v. Rutledge*, 623 F.3d 46, 59-61 (2d Cir. 2010) (invalidating State's denial of motorist's requested vanity license plate). If courts do not hesitate to protect vanity plates from unreasonable speech restrictions, then surely they should protect one's right to engage in political discourse—"the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

This Court's decision in *Burson v. Freeman* does not dictate otherwise. There, this Court did not retreat from the heightened protection that the First Amendment affords political speech. Instead, it reiterated that "[t]he First Amendment has its fullest

and most urgent application to" political speech. 504 U.S. at 196 (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). The decision in *Burson*, upholding a ban on campaign materials, was animated by concerns of election fraud and voter intimidation; concerns that do not exist with the non-campaign apparel at issue here. *See id.* at 201-06 (describing early problems with voter fraud and intimidation in the polling place). Moreover, the *Burson* plurality recognized that, at some point, "government regulation . . . could effectively become an impermissible burden" on speech. *Id.* at 210. Minnesota's legislature may not simply point to *Burson* to extend the sphere of its apparel ban, allowing the state to draw all apparel it deems political "into its impetuous vortex." The Federalist No. 48, at 333 (J. Madison) (J. Cooke ed., 1961).

In practice, enforcement of bans that do not further a state's interest in orderly elections comes at the expense of laws that do. Lower courts invalidating speech restrictions have pointed to many state laws that actually further an interest in orderly elections, such as those that empower the deputy sheriff to maintain "good order" at the polls, or prohibit the deprivation of voting rights. *CBS Inc. v. Smith*, 681 F. Supp. 794, 804 (S.D. Fla. 1988) (citing Florida statutes). States could also achieve the goal of preventing voter harassment by arranging polling places with separate entrances and exits and limiting the ability of people to approach voters on their way into the polls. *See Daily Herald Co. v. Munro*, 838 F.2d 380, 385 (9th Cir. 1988). These examples show that states interested in conducting orderly elections may focus their resources on alternatives that actually

further that interest, rather than broadly suppressing speech.

III

THIS CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO ADDRESS A RECURRING ISSUE CONCERNING CORE FIRST AMENDMENT RIGHTS

The issue presented is important, widespread, and recurring. At least nine other states have taken *Burson* as an unqualified mandate to enact broad political apparel bans at the polling place. *See* Kimberly J. Tucker, *"You Can't Wear That to Vote": The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. Marshall L. Rev. 61, 63 (2006).[10] Minnesota's political apparel ban covers an inordinate amount of speech, from Tea Party apparel to apparel with logos featuring the American Legion, NAACP, the National Rifle Association, and so on. App. D-18 n.7. Political apparel bans like the one here would have prevented voters from wearing any one of the tens of thousands of political artifacts featured in every presidential election since 1828. *See Picray*, 14 Or. App. at 601 n.12. Today, the same bans may reach common statements such as "God Bless America," "a shirt displaying the name of a religious school," or red and blue shirts, which may be construed to connote support for the Republican or Democratic Party. James J. Woodruff II, *Freedom of Speech & Election*

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[10] *See* Del. Code Ann. tit. 15, § 4942; Kan. Stat. Ann. § 25-2430(a); Mont. Code Ann. § 13-35-211(1); N.J. Stat. Ann. § 19:34-19; N.Y. Elec. Law § 8-104(1); S.C. Code Ann. § 7-25-180(B); Tenn. Code Ann. § 2-7-111(b)(1); Tex. Elec. Code Ann. § 61.010(a); Vt. Stat. Ann. tit. 17, § 2508(a).

Day at the Polls: Thou Doth Protest Too Much, 65 Mercer L. Rev. 331, 346 nn.120-122 (2014). In 2012, election workers in Colorado and Florida flagged down Massachusetts Institute of Technology students for wearing "MIT" shirts, because the workers had mistakenly thought the shirts evinced support for political candidate Mitt Romney. *See MIT Voters Flagged at Polls for Suspected Electioneering, Explain They're Not Shilling for Mitt Romney*, Huffington Post, Nov. 6, 2012.[11] In any event, the primary danger presented by an overbroad statute is not the potentially selective enforcement, but the overriding chilling effect that inhibits voters from exercising their First Amendment rights of expression. *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985).[12]

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[11] http://www.huffingtonpost.com/2012/11/06/mit-voters-flagged-at-polls-for-suspected-electioneeringexplain-not-shilling-for-romney_n_2084332.html.

[12] The Eighth Circuit's disposition of Petitioners' as-applied challenge only highlights the problem with the statute's facial overbreadth. After all, when a statute sweeps more broadly than is warranted by the evil at which it aims, "a concern arises that the legislature . . . has created an excessively capacious cloak of administrative or prosecutorial discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991); *see also Heffron v. Int'l Soc'y for Krishna Consciousness Inc.*, 452 U.S. 640, 649 (1981) (discussing how some rules that are open for arbitrary application and inherently inconsistent with a valid time, place, and manner regulation are unconstitutional because such discretion has the potential for becoming a means of suppressing a particular point of view). If Minnesota officials decided to enforce the political apparel ban against voters who wore Tea Party shirts, but not against voters who wore AFL-CIO shirts, their actions would surely have violated the First Amendment's prohibition on viewpoint discrimination. *See Reed*, 2010 WL 4394289, at *1 ("[T]here is no viewpoint neutral

This case presents an excellent vehicle for this Court to resolve the conflict between a state's creation of a speech-free zone and a voter's right to free speech. To aid this Court in its deliberations, Minnesota's written Election Day Policy defines "political speech," and the State's concessions provide the Court with concrete evidence of the statute's overbreadth. Respondents vigorously defended the Minnesota statute through multiple stages of litigation and have candidly confirmed the statute's expansive scope by acknowledging that the statute applies not just to the Tea Party, Election Integrity Watch, and MoveOn.Org, but also to the Chamber of Commerce and AFL-CIO. Oral Arg. at 19:48 (No. 11-2125). And although Judge Shepherd's separate opinion in 2013 notified Respondents that Minnesota's political apparel ban could apply to all sorts of groups (American Legion, NAACP, and so on), the State conceded at a recent oral argument that its policy remains unchanged. Oral Arg. at 23:16, *Minnesota Majority v. Mansky*, 849 F.3d 749 (8th Cir. 2017) (No. 15-1682).[13]

Finally, the procedural posture of this case is ideal for this Court's review. Petitioners' first petition for certiorari to this Court was filed in 2013, when their as-applied claim was still pending before the district court. Although litigants are permitted to raise both as-applied and overbreadth challenges in First Amendment cases, "the lawfulness of the particular

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principle to distinguish between 'tea party' apparel and AFL-CIO apparel."). Now that the lower courts have rejected any suggestion of selective enforcement, *see* App. A-6–A-7, this Court should invalidate the ban as substantiall, overbroad under the First Amendment.

[13] http://media-oa.ca8.uscourts.gov/OAaudio/2016/10/151682.mp3.

application of the law should ordinarily be decided first." *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989). Perhaps for that reason, Respondents previously opposed certiorari on the basis that "review of Petitioners' facial challenge [was] not appropriate because Petitioners' as-applied challenge [was] still pending." Opposition to Petition for Writ of Certiorari at 1, 9, *Minnesota Majority v. Mansky*, 134 S. Ct. 824 (2013) (No. 13-185). The Eighth Circuit has now resolved Petitioners' as-applied challenge and the interlocutory posture no longer presents a barrier to this Court's review. *See Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in the denial of certiorari).

CONCLUSION

This Court should grant the Petition.

DATED: May 2017.

Respectfully submitted,

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United States Court of Appeals
For the Eighth Circuit

No. 15-1682

Minnesota Majority

Plaintiff

Minnesota Voters Alliance; Minnesota Northstar Tea Party Patriots; Election Integrity Watch; Susan Jeffers, individually and as an election judge; Dan McGrath; Andy Cilek

Plaintiffs - Appellants

v.

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County; Virginia Gelms, in her individual and official capacity as the Elections Manager for Hennepin County; Mike Freeman, in his official capacity as Hennepin County Attorney; John Choi, in his official capacity as Ramsey County Attorney; Steve Simon, in his official capacity as Secretary of State

Defendants - Appellees

No. 15-1741

Minnesota Majority

Plaintiff

Minnesota Voters Alliance; Minnesota Northstar Tea Party Patriots; Election Integrity Watch;

Susan Jeffers, individually and as an election judge; Dan McGrath; Andy Cilek

Plaintiffs - Appellees

v.

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County; Virginia Gelms, in her individual and official capacity as the Elections Manager for Hennepin County; Mike Freeman, in his official capacity as Hennepin County Attorney; John Choi, in his official capacity as Ramsey County Attorney

Defendants

Steve Simon, in his official capacity as Secretary of State

Defendant - Appellant

Appeals from United States District Court for the District of Minnesota - Minneapolis

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Submitted: October 20, 2016
Filed: February 28, 2017

Before RILEY, Chief Judge, LOKEN and BENTON, Circuit Judges.

BENTON, Circuit Judge.

Several organizations and individuals sued the Minnesota Secretary of State and Ramsey and Hennepin county election officials, attacking a statute prohibiting the wearing of political insignia at a

polling place. This court previously reversed dismissal of these groups' as-applied First Amendment claim. *Minnesota Majority v. Mansky*, 708 F.3d 1051, 1059 (8th Cir. 2013). On remand, the district court granted summary judgment for the defendants. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

Minnesota Statute § 211B.11 prohibits wearing a "political badge, political button, or other political insignia . . . at or about the polling place on primary or election day." To help determine which materials were political, Minnesota election officials distributed an Election Day Policy with examples including: "Issue oriented material designed to influence or impact voting" and "Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." Election judges were instructed to ask anyone wearing an item violating the Policy to remove or cover it. If a person refused, the election official should allow the person to vote, but record the person's name and address for potential misdemeanor prosecution.

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, and their association—Election Integrity Watch ("EIW")—sued the Secretary of State and county election officials ("Minnesota") to enjoin enforcement of the statute and declare it unconstitutional. EIW alleged it was invalid—both facially and as-applied—under the First Amendment and violated their Equal Protection rights due to selective enforcement. Individuals associated with EIW claimed their speech

was chilled because they could not wear Tea Party logos and slogans at their polling places without fear of legal action.

The district court initially dismissed all claims. This court affirmed as to the Equal Protection and facial First Amendment claims, but reversed and remanded the as-applied First Amendment claim. *Minnesota Majority*, 708 F.3d at 1059. After "giv[ing] the parties sufficient opportunity to create an acceptable record," the district court granted summary judgment against EIW on the as-applied First Amendment claim.

II.

This court reviews de novo the grant of summary judgment. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* Facts "must be viewed in the light most favorable to the nonmoving party," but "[t]he nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts,' and must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.*, quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). There is no genuine issue if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita*, 475 U.S. at 587.

A polling place is a nonpublic forum. *Minnesota Majority*, 708 F.3d at 1057. Restrictions on speech in a nonpublic forum are constitutionally valid if viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves." *Id.* at 1057 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 49 (1983)). A state "has a legitimate interest in 'maintain[ing] peace, order and decorum' in the polling place" and "a compelling interest in 'protecting voters from confusion and undue influence' and 'preserving the integrity of its election process.'" *Id.*,(*first* quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *then* quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992)).

Here, the statute and Policy are viewpoint neutral and facially reasonable. *Id.* On remand, EIW needed to come forward with specific facts showing that banning Tea Party apparel in particular was not reasonable in light of the statute's purpose. *See id.* at 1057-59.

EIW argues the statute as applied to Tea Party apparel is not reasonable because the Tea Party is not a political party in Minnesota, does not endorse candidates or ballot issues, and its materials do not relate to anything on the ballot. EIW asserts that the apparel conveys only a philosophy, not an endorsement of particular candidates, ballot measures, or political parties.

EIW's argument fails to address that the statute and Policy prohibit more than election-related apparel. The statute and Policy prohibit "political"

apparel, defined as: "Material promoting a group with recognizable political views."

Even if Tea Party apparel is not election-related, it is not unreasonable to prohibit it in a polling place. In order to ensure a neutral, influence-free polling place, all political material is banned. To demonstrate that the Tea Party is political, Minnesota provided polling data and media coverage supporting the public perception that the Tea Party is political. It also noted that as of July 2010, the Tea Party was a recognized caucus in the U.S. House of Representatives. EIW offers nothing to rebut this evidence that the Tea Party has recognizable political views. A nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Torgerson*, 643 F.3d at 1042 (quoting *Matsushita*, 475 U.S. at 586-87). EIW has failed to demonstrate a genuine issue of material fact whether Tea Party apparel is political. Banning apparel with its name and logo is "reasonable because it is wholly consistent with the [state]'s legitimate interest in preserving" polling place decorum and neutrality. *See Perry*, 460 U.S. at 50.

EIW also argues that individuals in Tea Party apparel were victims of selective enforcement (concluding this indicates that the "protectable interest is not so 'compelling'"). As evidence of selective enforcement, some wearing Tea Party apparel stated that they were asked to remove or cover it—causing voting delays and some of their names and addresses to be recorded. However, others wearing "political" apparel—Sierra Club and Target logos and all red or blue—voted without incident.

(EIW agrees that individuals in Tea Party apparel were not denied access to the polling place, and some voted without being asked to remove or cover their Tea Party apparel.)

This argument fails. EIW offers only speculation that voters in other political apparel escaped enforcement of the statute. EIW's repeated assertions that there is "no evidence" of enforcement against non-Tea-Party political apparel and that "it is believed" the statute was not enforced except against Tea Party apparel is not "com[ing] forward with specific facts." *See Torgerson*, 643 F.3d at 1042. EIW's evidence shows no more than "metaphysical doubt," which is not a genuine issue of material fact. *See id.*

Based on the evidence, no reasonable trier of fact could conclude that the statute and Policy as applied to EIW violated its First Amendment rights. The district court properly granted summary judgment.[1]

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The judgment is affirmed.

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[1] Given this disposition of appeal 15-1682, it is not necessary to address the Secretary of State's cross-appeal 15-1741, which is dismissed as moot. However, the district court's ruling on the Secretary's jurisdictional arguments should not be followed, as it characterizes this court's silence as implicit rejection of those arguments. *Minnesota Majority v. Mansky*, 62 F. Supp. 3d 870, 874-75 (D. Minn. 2014).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, et al.,

Plaintiffs,

v. No. 10-cv-4401 (JNE/SER)
ORDER

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County, et al.,

Defendants.

This case is before the Court on motions for summary judgment brought by the three sets of Defendants: Hennepin County Elections Manager Virginia Gelms and Hennepin County Attorney Mike Freeman, collectively referred to as the Hennepin County Defendants; Ramsey County Elections Manager Joe Mansky and Ramsey County Attorney John Choi, collectively referred to as the Ramsey County Defendants; and Minnesota Secretary of State Steve Simon.[1] For the reasons discussed below, all three motions are granted.

Background

As the Court has previously described, *see Minnesota Majority v. Mansky*, --- F.Supp.3d - ---, 2014 WL 5243503, *1-2 (D. Minn. Oct. 15, 2014), the Plaintiffs brought this action just prior to the 2010

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[1] Current Minnesota Secretary of State Steve Simon and current Ramsey County Attorney John Choi are substituted as defendants for their predecessors. See Fed. R. Civ. P. 25(d).

general election in an effort to ensure that the Defendants would not bar them from wearing their "Please I.D. Me" buttons and Tea Party apparel to the polls. That effort implicated Minn. Stat. § 211B.11, subd. 1, a provision of Minnesota state election law which provides in relevant part that

> [a] person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day. . . .

Violation of this statute is a petty misdemeanor, Minn. Stat. § 211B.11, subd. 4, that may be prosecuted by a county attorney, *id.* § 211B.16.

On the eve of the election, the Court denied the Plaintiffs' motion for a temporary restraining order and preliminary injunction. The same day, the Defendants circulated a memorandum, referred to in

this litigation as the Election Day Policy, which reads as follows:

> Please use the following process when dealing with an individual who is displaying political or campaign material in the polling place.
>
> 1. Minnesota law prohibits persons from wearing "political badges, political buttons, or other political insignia" or displaying campaign material within the polling place.
>
> 2. Election judges have the authority to decide what is "political." Examples include, but are not limited to:
>
> - Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.
>
> - Any item including the name of a candidate at any election.
>
> - Any item in support of or opposition to a ballot question at any election.
>
> - Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).

- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)

3. If a person is wearing political material, you should do the following:

- Explain that state election law prohibits displaying political materials in the polling place. (Minnesota Statutes 211B.11, subdivision 1.)

- Ask the individual to either cover up or remove the political material while in the polling place.

- If they refuse, explain that eligible voters will be allowed to vote, but any refusal will be recorded and referred to appropriate authorities.

4. Even if a voter refuses to do so, you must permit any eligible voter to receive a ballot and vote.

5. Record the name and address of a voter from the polling place roster in the incident log, along with a brief description of the item (button, hat, t-shirt, etc.) that the voter refused to remove or cover up.

6. Election judges and official challengers are prohibited from displaying political or campaign material

> in the polling place. If they refuse to remove the political or campaign material, you can ask them to leave.

The implementation of this policy at the polls on election day affected several of the Plaintiffs:

> One was asked to cover or remove his [Tea Party] t-shirt. Another who refused to cover or remove his ["Please I.D. Me"] button had his name and address recorded. Yet another who was wearing both a t-shirt and a button was delayed several hours before voting. [The Plaintiffs] assert[] that the fear of prosecution stopped others from displaying the apparel. Still others who were wearing materials from [the Plaintiff organizations] and other similar organizations voted without incident.

Minnesota Majority v. Mansky, 708 F.3d 1051, 1055 (8th Cir. 2013).

After the election, the Plaintiffs filed an Amended Complaint, which is the operative one here. The Plaintiffs asserted three claims under 42 U.S.C. § 1983: at Count I, for a violation of their First Amendment rights; at Count II, for a violation of their right to Due Process under the Fourteenth Amendment; and at Count III, for a violation of their right to Equal Protection under the Fourteenth Amendment. The Plaintiffs also asserted in Count IV that Minn. Stat. § 211B.11, subd. 1 is unconstitutional under the First Amendment.

The Court subsequently granted the Defendants' motion to dismiss the Amended Complaint in its entirety. The Plaintiffs appealed the dismissal of their First Amendment and Equal Protection claims. In 2013, the Eighth Circuit Court of Appeals affirmed the dismissal of the Plaintiffs' Equal Protection claim and their First Amendment facial challenge, but reversed and remanded their First Amendment as-applied challenge for consideration under the standards of Federal Rule of Civil Procedure 56. *Minnesota Majority*, 708 F.3d at 1054.

In these remand proceedings, the Minnesota Secretary of State previously filed a motion to dismiss or for summary judgment. In October of 2014, the Court granted him summary judgment on the portion of the Plaintiff's First Amendment as-applied claim that relates to the "Please I.D. Me" buttons, but denied his motion as it pertained to the portion of the claim relating to Tea Party apparel. *Minnesota Majority*, --- F.Supp.3d ----, 2014 WL 5243503, *5-8.

Discussion

The Ramsey County Defendants, Hennepin County Defendants, and the Secretary of State have now each moved for summary judgment on what remains of the Plaintiffs' First- Amendment as-applied claim. As explained below, all three of these motions are granted.

I. Dismissal of the Ramsey County Defendants

As a threshold matter, the Ramsey County Defendants argue in their motion that they should be dismissed from the case at this time because the only Plaintiff who claimed to have been affected by the prohibition on wearing "Please I.D. Me" buttons and Tea Party apparel at a polling place in Ramsey County – Jeff Davis – withdrew as a party in September of 2014. *See* Stipulated Agreement Dismissing the Plaintiffs Jeff Davis and Dorothy Fleming, ECF No. 125. The Amended Complaint alleged that Davis, a Ramsey County voter, chose not to wear his "Please I.D. Me" button and Tea Party t-shirt to the polls in 2010 out of fear of prosecution by Ramsey County officials. Amended Complaint ¶¶ 76-82, ECF No. 42.

In their briefing, the Plaintiffs failed to respond at all to the Ramsey County Defendants' argument. When the Court prompted the Plaintiffs to state their position on the matter at oral argument, they indicated only that they believe their case against the Ramsey County Defendants to survive Davis' withdrawal because one of the Plaintiffs who remains a party, Susan Jeffers, is an election judge in Ramsey County.

The Plaintiffs' bare reference to Jeffers, particularly in light of their failure to brief the issue, is an insufficient response to the Ramsey County Defendants' argument. The only claim that survived to these remand proceedings is the Plaintiffs' First Amendment as-applied challenge to Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy. The

injury the Plaintiffs claim to have suffered is the violation of their asserted constitutional right to wear their "Please I.D. Me" buttons and Tea Party apparel to the polls. Jeffers' presence in the case as a plaintiff does not work to tie any such injury to the conduct of the Ramsey County Defendants.

According to the Amended Complaint, "Jeffers is an eligible and registered voter in Minnesota, residing [in] New Brighton" and "an election judge in Ramsey County, Minnesota." *Id.* ¶ 12. Beyond that, though, the Amended Complaint alleges only: that Jeffers contacted Ramsey County Elections Manager Joe Mansky prior to the 2010 general election "regarding certain rumors relating to Election Integrity Watch 'Please I.D. Me.' Buttons and North Star Patriots shirts"; that Mansky informed Jeffers that those buttons and shirts would be prohibited at Ramsey County polling places; and that Jeffers was "shocked" and "disagrees with" that position. *Id.* ¶¶ 50-56. There is no allegation that Jeffers has ever attempted in the past, or intends in the future, to wear a "Please I.D. Me" button or Tea Party apparel to the polls in Ramsey County, nor that has she in any manner been deterred from doing so by the Ramsey County Defendants.

The Ramsey County Defendants are therefore dismissed from this case. Furthermore, even if the Ramsey County Defendants were not entitled to dismissal on these grounds, they have joined the arguments of the Hennepin County Defendants and the Secretary of State that are discussed in Sections II and III below, and the Court would grant their motion for summary judgment on those bases.

II. "Please I.D. Me" buttons and the Hennepin County Defendants

A second preliminary issue arises from the Court's October 2014 decision granting the Secretary of State's motion for summary judgment with respect to the Plaintiffs' First Amendment challenge to the application of Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy to their "Please I.D. Me" buttons. While the Hennepin County Defendants did not join the Secretary's motion at the time, they now argue that the record and reasoning on which the Court's decision rests apply equally to them, such that they too are entitled to summary judgment on that aspect of the Plaintiffs' as-applied claim.

The Court agrees. And, it should be noted, the Plaintiffs conceded this point. The Plaintiffs did not oppose this aspect of the Hennepin County Defendants' motion. And, in fact, the Plaintiffs stated at oral argument that they are no longer pursuing their claim as it pertains to their "Please I.D. Me" buttons.

Summary judgment is therefore granted to the Hennepin County Defendants on the portion of the Plaintiffs' First Amendment as-applied claim that relates to the "Please I.D. Me" buttons.

III. Tea Party apparel

Consequently, the only claim that remains is the Plaintiffs' First Amendment challenge to the Secretary of State and Hennepin County Defendants' application of Minn. Stat. § 211B.11, subd. 1 and the

Election Day Policy to their Tea Party apparel. The Defendants have moved for summary judgment on this as-applied claim, arguing that prohibiting the Plaintiffs from wearing Tea Party apparel at the polling place does not violate their First Amendment rights.

In its decision on the Plaintiffs' appeal, the Eighth Circuit explained that "[u]nder the First Amendment, the statute and Policy are constitutional as applied to [the Plaintiffs] if their application to [them] is viewpoint neutral and 'reasonable in light of the purpose which the forum at issue serves.'" *Minnesota Majority*, 708 F.3d at 1059 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)).

Summary judgment may only be granted to the Defendants if they can show both "that there is no genuine dispute" as to any material fact and that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Defendants must support the assertion that there is no genuine dispute of material fact either "by citing to particular parts of materials in the record" or by showing that the Plaintiffs "cannot produce admissible evidence to" create a genuine dispute. Fed. R. Civ. P. 56(c)(1). This record evidence "and all fair inferences from it" are viewed "in the light most favorable to" the Plaintiffs. *Johnson v. Blaukat*, 453 F.3d 1108, 1112 (8th Cir. 2006).

As explained below, on the record before the Court, the Defendants have carried their burden and are entitled to summary judgment.

A. Viewpoint neutral

The first prong of the First Amendment as-applied analysis is whether the Defendants' application of Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy to the Plaintiffs' Tea Party apparel is "viewpoint neutral." *Minnesota Majority*, 708 F.3d at 1059.

It is. The third sentence of Minn. Stat. § 211B.11, subd. 1 prohibits the wearing of "[a] political badge, political button, or other political insignia . . . at or about the polling place on the day of a primary or election." The Eighth Circuit determined that that provision of the statute "is viewpoint neutral" because it "applies to all political material, regardless of viewpoint" and "does not define 'political' to include or exclude any view." *Id.* at 1057, 1059.

In fact, the statute does not define "political" at all. In the absence of a statutory definition, the Election Day Policy provides guidance to the election judges who staff the polling places and are tasked with determining what constitutes prohibited "political" material. Giving content to that term, the policy the Defendants drafted

> recites as examples of "political": "the name of political party [sic] in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties"; items "in support of or opposition to" any ballot question; "[i]ssue oriented material designed to influence or impact voting (including

> specifically the 'Please I.D. Me' buttons"); and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)."

Id. at 1059. The Eighth Circuit determined that the Election Day Policy is viewpoint neutral because these parameters for identifying "political" material at the polls – within which the Plaintiffs' "Please I.D. Me" buttons and Tea Party apparel explicitly fall – "do not exclude any party, material, or group from the Policy's application and do not favor or disfavor any view." *Id.* at 1059.

The statute and Election Day Policy are therefore not viewpoint-discriminatory restrictions. Under the Election Day Policy, the Plaintiffs' Tea Party apparel comes within the scope of the statutory prohibition on "political" material in the polling place because it is clothing that "promot[es] a group with recognizable political views," not because of the particular set of political views that that group holds. In the same way, the policy bars the Plaintiffs' "Please I.D. Me" buttons from the polls because they are "[i]ssue oriented material[s] designed to influence or impact voting," not because they reflect or are associated with a particular stance on an issue.

The Plaintiffs do not contest that the application of the statute and Election Day Policy to them is, in this sense, viewpoint neutral. On these motions, however, they do argue that, in a different sense, the statute and Election Day Policy have been applied to them in a viewpoint-discriminatory manner – namely, that the statute and policy have been

"selectively enforced" against individuals wearing Tea Party apparel at the polls. In support of this contention, the Plaintiffs indicate, by way of affidavit, the following:

- Plaintiff Andy Cilek attests that he was prevented from wearing his Tea Party Patriots t-shirt in the polling place during the November 2010 general election. Cilek, however, states that he observed other voters at the polls wearing "red Target shirts with a Target bulls-eye symbol," other "corporate logos," "all red or all blue apparel," and "apparel of . . . organization[s] that . . . endorse candidates such as the Sierra Club," who were not made to cover or remove that apparel.

- Cilek also avers that he has "found no evidence" that individuals who wore the apparel of organizations that endorse candidates – such as the Sierra Club, its Minnesota North Star Chapter, the Minnesota AFL-CIO, and Minnesota Education – to the polls have been "targeted for possible prosecution."

- Plaintiff Dan McGrath likewise states that he has "found no evidence" that individuals

> wearing the apparel of "organizations that endorse candidates" such as the National Rifle Association and Take Action MN to the polls have been "targeted for possible prosecution."

However, even accepting these assertions as facts and assuming that they would be sufficient to establish that the Plaintiffs have been the subjects of viewpoint-discriminatory enforcement of Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy,[2] the Plaintiffs have nonetheless failed to demonstrate that there is a genuine issue of material fact regarding the Defendants' liability.

The Plaintiffs pled and argued the same charge of viewpoint-discriminatory enforcement against the Defendants earlier in this litigation in support of their since-dismissed Equal Protection claim. See Amended Complaint ¶¶ 117-19, ECF No. 42 (alleging in support of Equal Protection claim that "[t]he Defendants admit that they adopted a policy that prohibited the wearing of Election Integrity Watch 'Please I.D. Me'

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[2] The Plaintiffs claim not only that other voters have not been prohibited from wearing clothing associated with organizations of a similar ilk to the polls, but also that Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy have been enforced inconsistently against them. *See, e.g.*, Amended Complaint ¶¶ 67, 73, ECF No. 143 ("On November 2, 2010 within Hennepin County, in places serving as a polling place, some election judges allowed individuals to wear the message of the Election Integrity Watch – 'Please I.D. Me.' No election judge stopped or questioned the wearing of the button in those polling places.")

buttons and Tea Party Patriots clothing at the polling place and did not enforce or otherwise apply a similar policy to other groups" and that "the standardless discretion" the statute and Election Day Policy give to election judges "resulted in inconsistent enforcement"). On the Plaintiffs' appeal, the Eighth Circuit determined that these allegations fail to state a claim against the Defendants:

> [The Plaintiffs] argue[] that election judges selectively enforced the statute and the Policy. Even if the complaint adequately described how the statute and Policy were enforced differently among similarly situated people (including among people who wore the "Please I.D. Me" buttons), the complaint must also allege that [the Defendants] caused the selective enforcement. *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990) ("Liability under § 1983 requires a causal link to, and direct responsibility for, the deprivation of rights."). While causation is generally a question of fact, this court may decide the question as a matter of law where "the question is so free from doubt as to justify taking it from the [fact finder]." *Parrish v. Ball*, 594 F.3d 993, 1000 (8th Cir.2010) (alteration in original), *quoting Ricketts v. City of Columbia*, 36 F.3d 775, 779–80 (8th Cir.1994).
>
> Because the statute and Policy do not "affirmatively sanction" selective

enforcement, this court analyzes the claim against the municipalities and the official-capacity defendants under the "deliberate indifference" standard of *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L.Ed.2d 412 (1989). *Szabla v. City of Brooklyn Park, Minn.*, 486 F.3d 385, 390 (8th Cir. 2007) (en banc) ("Where a policy is constitutional on its face, but it is asserted that a municipality should have done more to prevent constitutional violations by its employees, a plaintiff must establish the existence of a 'policy' by demonstrating that the inadequacies were a product of deliberate or conscious choice by policymakers. The standard of fault in that situation is 'deliberate indifference' to constitutional rights." (internal citation omitted)). The complaint alleges only that the Policy's "standardless discretion" resulted in selective enforcement. The Policy's delegation of discretion to election judges did not, without more, cause selective enforcement. *See Dick v. Watonwan Cnty.*, 738 F.2d 939, 942–43 (8th Cir. 1984) (holding that a municipality's policy giving discretion to subordinates did not subject the municipality to liability for the subordinates' errors of judgment).

This court has not reviewed a suit against an individual-capacity defendant

> who wrote a policy so standardless that it caused selective enforcement. The closest analogy is suing an individual-capacity defendant for failure to train subordinates, causing selective enforcement. A supervisor may be individually liable for failure to train subordinates if it amounts to deliberate indifference to the rights of persons whom the subordinates harm. *Parrish*, 594 F.3d at 1002; *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996) (applying the same standard from official-capacity failure to train to the individual-capacity allegation). The same "deliberate indifference" standard applies in this case. The election supervisors' Policy that delegated discretion to election judges did not, without more, cause selective enforcement. *See Dick*, 738 F.2d at 942 ("The Board might have chosen to adopt more detailed guidelines, and such rules might have averted the mistake that was made in this case, but the Board's decision to rely on its employees' judgment is certainly not unconstitutional in and of itself....").
>
> [The Plaintiffs] ha[ve] failed to allege that [the Defendants] caused selective enforcement of the facially neutral statute and Policy, and has therefore failed to state an equal protection claim.

Minnesota Majority, 708 F.3d at 1060.

In the face of this adverse decision, the Plaintiffs attempt to revive their charge of selective enforcement here by arguing that it is equally cognizable on an as-applied challenge under the First Amendment as on one brought under the Equal Protection Clause. *See McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004) (distinguishing two separate "types of as-applied attacks" under the First Amendment: the first involving the "testing" of a broadly-worded and widely-applicable statute "in one particular fact situation while refusing to adjudicate the constitutionality of the law in other fact situations," and the second "based on the idea that the law itself is neutral and constitutional in all fact situations, but that it has been enforced selectively in a viewpoint discriminatory way"). *But see Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (explaining that a claim "that discriminatory enforcement of a speech restriction amounts to viewpoint discrimination in violation of the First Amendment" is distinct from an as-applied First Amendment challenge, which "contends that the law is unconstitutional as applied to the litigant's particular speech activity [and] does not implicate the enforcement of the law against third parties"). The Plaintiffs' implication, apparently, is that even if the Eighth Circuit has already rejected their selective enforcement allegations under the rubric of an Equal Protection claim, they nonetheless remain viable here in the guise of their surviving First Amendment as-applied challenge.

This is not correct. As the Eighth Circuit's decision reflects, the Amended Complaint alleges –

and the record now bears out – that the Defendants drafted and disseminated the Election Day Policy. But, it was election judges – who are not parties to this case – who were tasked with enforcing Minn. Stat. § 211B.11, subd. 1 and implementing that policy at the polling places. Even assuming for the purposes of this motion that the election judges did engage in viewpoint-discriminatory enforcement of the facially-neutral statute and Election Day Policy as the Plaintiffs contend, the Eighth Circuit determined that the Defendants may be held liable here under § 1983 only if they were "deliberately indifferent" to that violation of the Plaintiffs' constitutional rights. It makes no difference to that analysis whether selective enforcement by the election judges constitutes a violation of the Plaintiffs' constitutional rights under the First Amendment or the Equal Protection Clause. Either way, the Eighth Circuit concluded that the discretion granted to the election judges in the Election Day Policy does not supply the requisite causal link between the Defendants and the constitutional violations allegedly committed by the election judges.

And the Plaintiffs have offered nothing more here. There is no hint anywhere in the Plaintiffs' pleadings, arguments, or evidence of any causal link between the selective enforcement allegedly committed by the election judges and the Defendants.[3]

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[3] The Plaintiffs, citing what they characterize as a "paucity of facts regarding the application of the [sic] Minnesota Statute § 211B.11 and the accompanying so-called Election Day policy," state in their brief that they "shall . . . move under Rule 56(d) to request the disposition [sic] of this Court's decision on the Defendants' motions be delayed to allow time for discovery."

The Plaintiffs accuse the Defendants of doing no more than drafting and distributing a viewpoint-neutral policy whose terms were to be implemented at the polls by election judges.[4] The Eighth Circuit has already held that that does not give rise to the Defendants' liability.

In sum, then, there is no genuine dispute to be had on this record regarding whether the Defendants applied the statute and Election Day Policy to the

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However, the Plaintiffs did not actually make such a motion, nor have they submitted an affidavit or declaration attesting to the discovery that would be needed to respond to the Defendants' motions, as required by the rule. *See Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010) ("To obtain a Rule 56([d]) continuance, the party opposing summary judgment must file an affidavit "affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.") (*quoting Humphreys v. Roche Biomedical Lab., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993)).

Furthermore, the Plaintiffs have failed throughout these proceedings to articulate any basis at all on which to even suspect that there may be any link between the Defendants and the selective enforcement that they contend was committed by the election judges at the polls. *See Duffy v. Wolle*, 123 F.3d 1026, 1041 (8th Cir. 1997), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) ("[I]t is well settled that Rule 56([d]) does not condone a fishing expedition where a plaintiff merely hopes to uncover some possible evidence of a constitutional violation.") (quotation omitted).

[4] It bears noting that the Plaintiffs do not claim to have been prosecuted under Minn. Stat. § 211B.11. In fact, the Plaintiffs do not allege that any county attorney, including the Defendant Hennepin County Attorney and Ramsey County Attorney, has ever prosecuted anyone under Minn. Stat. § 211B.11.

Plaintiffs' Tea Party apparel in a viewpoint-neutral manner. They did.

B. Reasonable

On the second prong of the First Amendment as-applied analysis, "the statute and the Election Day Policy are constitutional as applied to [the Plaintiffs] if their application to [them] is . . . reasonable in light of the purpose which the forum at issue serves." *Minnesota Majority*, 708 F.3d at 1059 (quotation omitted).

The forum at issue, of course, is the polling place, the purpose of which is to facilitate "each voter's [private] communication of his own elective choice," *Marlin v. District of Columbia Bd. of Elections and Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001), and to protect the citizen in that effort from the "two evils" of "voter intimidation and election fraud." *Burson v. Freeman*, 504 U.S. 191, 206 (1992). Accordingly, the Eighth Circuit recognized that "[t]he state has a legitimate interest in maintain[ing] peace, order, and decorum in the polling place," as well as a "compelling interest in protecting voters from confusion and undue influence and preserving the integrity of its election process." *Minnesota Majority*, 708 F.3d at 1057 (quotations omitted).

Minnesota state law contains a number of provisions ostensibly in service of these ends. *See, e.g.*, Minn. Stat. § 204C.06 (ensuring that individuals are "allowed to go to and from the polling place for the purpose of voting without unlawful interference" and providing for a sergeant-at-arms "to keep the peace"

at the polling place); *id.* § 204C.10 (setting voter registration requirements); *id.* § 204C.13 (directing that the voter "retire alone to an unoccupied voting booth" to mark the ballot and requiring that the ballot be "fold[ed] to conceal the face and all marks on it" before being handed to the election judge for deposit in the ballot box).

Minn. Stat. § 211B.11, subd. 1 is another. And indeed, the evidence before the Court is that the Election Day Policy was written to guide the election judges tasked with enforcing that statute at the polls in "maximize[ing] voter participation and minimiz[ing], if not eliminate[ing] all, disruption of the polling place . . . ." Affidavit of Joseph Mansky at 2, ECF No. 153-1 at 24. The question here is whether the application of the statute to the Plaintiffs' Tea Party apparel – which the Defendants communicated to the election judges in the Election Day Policy – is a reasonable means of achieving those legitimate state interests. To pass constitutional muster, it must be one – rather than "the most" or "the only" – reasonable means of doing so. *Minnesota Majority*, 708 F.3d at 1058 (*quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Ind.*, 473 U.S. 788, 808 (1985)).

The starting point for answering that question is the text of Minn. Stat. § 211B.11, subd. 1, which contains two potentially relevant prohibitions. The first, in sentence one, states that "[a] person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on

primary or election day to vote for or refrain from voting for a candidate or ballot question." As the Eighth Circuit noted in regard to the Plaintiffs' facial challenge, the Supreme Court in *Burson* found an analogous statutory prohibition on "campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" within 100 feet of a polling place to be "necessary and narrowly tailored" to achieve the state's interests. 504 U.S. at 193, 206, 211. Nevertheless, in their as-applied challenge, the Plaintiffs argue here that this prohibition cannot reasonably be applied to their Tea Party apparel because the undisputed evidence demonstrates that the Tea Party is not a "political party" under Minnesota law, *see* Minn. Stat. § 200.02, subd. 6 (defining "political party" as "an association of individuals under whose name a candidate files for partisan office"), and it does not endorse candidates or take official positions on ballot questions.

Whatever the merits of that argument,[5] Minn. Stat. § 211B.11, subd. 1 contains a second relevant prohibition. In its third sentence, the statute also bans the wearing of "political badges, political buttons, or other political insignia at or about the polling place on the day of a primary or election." This prohibition is

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[5] The Plaintiffs' claim that the Tea Party does not take positions on ballot questions is not supported by the facts before the Court, particularly in light of the record evidence regarding Plaintiff Minnesota Northstar Tea Party Patriots' involvement in Election Integrity Watch's voter identification campaign. *See infra* note 6.

not limited, as sentence one is, to material designed to "induce or persuade a voter . . . from voting for a candidate or ballot question."

Instructive here, then, as the Eighth Circuit's analysis indicates, is that "[o]ther courts have applied *Burson* to uphold bans on material unrelated to any issue on the ballot." *Id.* at 1058. For instance, the Eleventh Circuit "conclude[d] that [a] Florida statute . . . banning Plaintiffs from engaging in exit solicitation about a non-ballot issue within 100 feet of polling places in Florida" is an appropriate "precaution[] to protect and facilitate voting." *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1222 (11th Cir. 2009). Similarly, the Fifth Circuit determined that a Louisiana statute prohibiting "all solicitation of signatures for a recall petition that is not on the ballot" within 600 feet of the polling place – including "all wearing of clothing or buttons bearing visible words or symbols supportive of such recall" – to be "the most defensible" way for the state to "protect[] its voters" from "politicking." *Schirmer v. Edwards*, 2 F.3d 117, 123-24 (5th Cir. 1993).

In light of these precedents, and on the record before the Court, there is no genuine question that the Defendants' application of the ban on "political badges, political buttons, or other political insignia" in Minn. Stat. § 211B.11, subd. 1's third sentence to the Plaintiffs' Tea Party apparel is reasonable. That apparel consists of t-shirts and hats bearing the words "Tea Party Patriots" and the group's shield. *See* Amended Complaint Ex. B, ECF No. 42-1. Some of the t-shirts also feature a slogan in conjunction with that

name and shield, including "Fiscal Responsibility, Limited Government, Free Markets," "Don't Tread on Me," "We'll Remember in November," and "Liberty." *Id.*

The Defendants have submitted a volume of evidence pertaining to the Tea Party, including the following:

- a printout from Plaintiff Election Integrity Watch's website attesting that its fellow Plaintiff "Northstar Tea Party Patriots is an alliance of tea party groups from across the state of Minnesota [whose] goal is to attract, educate, organize, and mobilize citizens to secure public policy consistent with our three core values of Fiscal Responsibility, Constitutionally Limited Government and Free Markets";

- a Pew Research Center report on "the nature and scope of political polarization in the American public" stating that "[s]upport for the Tea Party is concentrated about evenly within . . . two conservative typology groups: . . . Steadfast Conservatives and . . . Business Conservatives," while "groups with a Democratic leaning express more disagreement than agreement" with the Tea Party;

- a New York Times article stating that "[t]he Tea Party movement set the agenda [and] propel[ed] the Republican sweep" in the United States House of Representatives in the

November 2010 general election, while also "carr[ying] to victory" two Republican Senators;

- a printout from the website of the United States House of Representatives Committee on House Administration showing that the House Tea Party Caucus was approved in July of 2010 and was at that time chaired by Representative Michele Bachmann of Minnesota, as well as a list of members of that caucus as of December of 2010; and

- a local news article discussing tensions between "mainstream" Republicans and Tea Party "activists," while attributing to the Chairman of the Minnesota Republican Party the sentiment that "tea party energy and ideas make the GOP more vibrant than the Democratic Party."

The Plaintiffs have submitted evidence of their own regarding the Tea Party and their perspectives on the significance of wearing its apparel:

- Plaintiff Cilek states in his affidavits that, while he is "not a member of the [Plaintiff] Minnesota Tea Party Patriots," he did wear a t-shirt "with the large printed statement 'Don't tread on me'" and "the statement 'Tea Party Patriots' on it as well in small print" to the polls in 2010. Cilek indicates that he "liked the

apparel for the statement 'Don't tread on me'" and "saw that statement as symbolic of who I am as a person – independent as a thinker and doer – and that others should not take advantage of me or disrespect me," while "[t]he Tea Party Patriots small logo was of little consequence to me . . . ." Cilek did not consider his t-shirt to be an "endors[ement of] a particular candidate or ballot question if a question was on the ballot."

- Plaintiff McGrath states in his affidavit that Tea Party apparel "convey[s] a philosophy and do[es] not support candidates, political parties or ballot measures."

- Former Plaintiff Randy Liebo, an organizer for the Minnesota Northstar Tea Party Patriots and "an advocate of the Northstar Patriots effort," states in an affidavit that "Tea Party Patriots shirts or hats . . . reflect the values of the organization inclusive of subjects such as fiscal responsibility, constitutionally limited government and free markets." Liebo further states that the wearing of Tea Party apparel is an "expression[] of free speech or association with the group" and its "demand [for] governmental integrity, rather than an endorsement of "a specific candidate or ballot question."

- Former Plaintiff Jeff Davis states in his affidavit that, "[i]n preparation for the 2010 election," the Minnesota Northstar Tea Party Patriots and two other Plaintiff organizations "formed a coalition 'referred to as 'Election Integrity Watch,' a concerned grass roots effort to protect election integrity." Davis further states that Election Integrity Watch created the "Please I.D. Me" buttons, which were intended to be worn to the polls by "its separate organizational members and supporters," and also "developed a program for individuals . . . to act as poll watchers . . . ."[6]

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[6] Though Davis, and the Plaintiffs generally, contend that the "Please I.D. Me" buttons were not part of a "political campaign related to voter identification," the facts in the record are clearly to the contrary.

As the Court explained in its October 2014 order, Plaintiff Election Integrity Watch stated on its own website in the lead-up to the 2010 general election that Minnesota Voters Alliance – one of its three constituent organizations – was "currently working to pass voter photo ID [requirements] in both state and city government." Minnesota Majority, --- F.Supp.3d ---, ---, 2014 WL 5243503, *6 (quoting Kaardal Declaration Ex. A, ECF No. 8-6 at 10). Indeed, Minnesota Voters Alliance itself stated on its website that one of its "main goals" was to "[p]rotect the integrity of the vote through a photo I.D. requirement at the polls." Kaardal Declaration Ex. E, ECF No. 8-6 at 17.

Furthermore, the affidavit of Defendant Joseph Mansky – which the Plaintiffs submitted on these motions – recounts that a Republican-sponsored photo identification bill failed in the Minnesota legislature in 2009 on a party-line vote. Kaardal Declaration Ex. 10, ECF No. 153-1 at 25-26. Election Integrity Watch's "Action Plan" for its "Please I.D. Me" buttons specifically references that legislative effort. Kaardal Declaration Ex. B, ECF

Fundamentally, then, the Plaintiffs' opposition to the Defendants' motions is grounded in their contention that the Tea Party is not "political." The Plaintiffs strive to define the Tea Party as an apolitical "philosophical" organization or movement; their argument is that there can be no logical connection between a group of that nature and a statutory prohibition that is designed to preserve the decorum of the voting process and to protect voters from politicking at the polls on election day.[7]

No. 8-6 at 13 ("When you go to vote on November 2, wear your Election Integrity Watch button and show your photo ID when you sign-in to vote. While Minnesota does not require an individual to show an ID, let's act like it does. . . . (Although polls show that over 80% of Minnesotans support requiring a photo ID to vote, this measure has been repeatedly blocked by leaders in the Minnesota state legislature).").

Mansky also explains that the Republican candidates for governor and Secretary of State in 2010 identified the passage of photo identification requirements as among their priorities if elected. Kaardal Declaration Ex. 10, ECF No. 153-1 at 26-27. And, as the Court has noted, a proposed amendment to the Minnesota Constitution that would have required photo identification for voting appeared on the ballot in 2012, and was rejected. *Minnesota Majority*, --- F.Supp.3d ----, 2014 WL 5243503, *6 n.2. *See also* Office of the Minnesota Secretary of State, Results for Constitutional Amendments, http://electionresults.sos.state.mn.us/Results/AmendmentResultsStatewide/1.

[7] The Plaintiffs also attempt here to revive an argument that Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy are unconstitutionally vague. But, like the Plaintiffs' selective enforcement allegations, this claim did not survive the Eighth Circuit's decision on the Plaintiffs' appeal.

In its 2011 order of dismissal, the Court rejected all of the Plaintiffs' vagueness claims as they pertain to both the statute and the Election Day Policy. *Minnesota Majority v. Mansky*, 789 F.Supp.2d 1112, 1124-29 (D. Minn. 2011). On appeal, the

The Plaintiffs' effort to deny the obviously political nature of the Tea Party, however, is as unconvincing now as it was when the Plaintiffs first made it at the outset of this case. In the 2011 order of dismissal, the Court addressed the issue as follows:

> Plaintiffs' argument that the buttons and T-shirts in question are not political is unavailing. . . .
>
> [T]he Tea Party apparel communicates support for the Tea Party movement which is associated with particular views on matters of public governance. The Amended Complaint describes the North Star Tea Party Patriots as "a coalition of local associations in Minnesota with a mission to attract, educate, organize, and mobilize citizens to secure public policies consistent with values inclusive of fiscal responsibility, constitutionally limited government and free markets." (Am. Compl. ¶ 9) The Amended Complaint acknowledges that the Tea Party apparel at issue "reflect[s] the[se] values." (Am

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Plaintiffs failed to preserve any challenge to the statute and policy based on vagueness. As the Eighth Circuit noted there, [The Plaintiffs] note[] that the statute does not define "political." [The Plaintiffs], however, do[] not include the word "vague" or "vagueness" in [their] argument to this court. [The Plaintiffs] ha[ve] waived [their] vagueness challenge by failing to brief it to this court. *United States v. Frook*, 616 F.3d 773, 777 n.2 (8th Cir. 2010).
Minnesota Majority, 708 F.3d at 1057 n.2.

Compl. ¶ 45) In July 2010 the U.S. House of Representatives recognized a Tea Party caucus consisting entirely of Republican members of Congress. Mobilizing public opinion on matters of fiscal or electoral policy, or on the proper reach of government, like persuading and organizing elected representation, is "political" activity by any fair estimation. Whether a group endorses candidates for public office is not the litmus test for whether it is a "political" organization. Such a pinched definition of politics would be inconsistent with the fundamental premise of American democracy: the power to govern, on any number of matters that come to be of general concern, belongs to the people. The vigorous debate about those matters is political, whether or not it finds expression in a registered political party as defined by the Minnesota Statutes. *See* Minn.Stat. § 200.02, subd. 6 (2010). The Court concludes that prohibiting apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of "maintain [ing] peace, order, and decorum" at the polls. *Mills*, 384 U.S. at 218, 86 S. Ct. 1434; accord *Burson*, 504 U.S. at 211, 112 S. Ct. 1846 ("The Court ... has recognized that a State indisputably has a compelling interest in preserving the integrity of its election process." (quotation marks omitted)); *see also*

> Minn. Stat. § 204C.08, subd. 1d (2010) (voters in Minnesota "have the right to vote without anyone in the polling place trying to influence [their] vote"). Given the statements made by the apparel and buttons, and the singular purpose of the polling place, it is inconsequential that the institutional Plaintiffs are not political parties, that the institutional Plaintiffs do not endorse political candidates, and that there was no ballot measure on voter identification on the November 2, 2010, ballot. The Court finds section 211B.11 constitutional as applied.

Minnesota Majority, 789 F.Supp.2d at 1123-24. The summary judgment record now before the Court compels this conclusion anew here.

At bottom, the evidence in the record cannot reasonably be construed but to demonstrate that the Plaintiffs' Tea Party apparel constitutes a "political badge, political button, or other political insignia" under Minn. Stat. § 211B.11, subd. 1, that it is "[m]aterial promoting a group with recognizable political views" under the Election Day Policy, and that prohibiting it from the polling place on election day is a reasonable means of achieving the state's legitimate interest in protecting voters from politicking at the polls. Regardless of whether the Tea Party endorses candidates or takes official positions on ballot questions, it is undisputed that the Tea Party's explicit goal is "attract, educate, organize, and mobilize citizens to secure public policy consistent

with [its] three core values of Fiscal Responsibility, Constitutionally Limited Government and Free Markets," and that it attempts to advance those values in the public realm by engaging in various ways with the elections process and electoral politics, both locally in Minnesota and nationally. And whatever the Plaintiffs' subjective views on the message they intend to convey by wearing apparel with the name, shield, and slogans of the Tea Party to the polls on election day, the evidence is that the Tea Party is widely recognized by the general public and generally considered to be most closely associated, if not always aligned, with the Republican party and Republican politicians.

In short, the Plaintiffs' insistence that their Tea Party apparel cannot reasonably fall within the viewpoint-neutral prohibition on politicking contained in Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy because the Tea Party is not "political" is unavailing. The facts before the Court cannot support such a position. Because the record demonstrates that barring the Plaintiffs from wearing their Tea Party apparel to the polling place is reasonable in light of the purpose that forum serves, the Defendants are entitled to summary judgment. It is therefore granted.

Based on the record, files, and proceedings herein, and for the reasons discussed above, IT IS ORDERED THAT:

1. The Hennepin County Defendants' Motion for Summary Judgment [ECF No. 133] is GRANTED.

2. The Defendant Secretary of State's Motion for Summary Judgment [ECF No. 142] is GRANTED.

3. The Ramsey County Defendants' Motion for Summary Judgment [ECF No. 148] is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 23, 2015

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, et al.,

Plaintiffs,

v. No. 10-cv-4401 (JNE/SER)
ORDER

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County, et al.,

Defendants.

This case is before the Court on a motion to dismiss or for summary judgment brought by Defendant Mark Ritchie, the Minnesota Secretary of State. In response, the Plaintiffs have filed their own motion requesting that the Court deny or delay disposition of that motion under Federal Rule of Civil Procedure 56(d).

For the reasons discussed below, Ritchie's motion is granted in part and denied in part, while the Plaintiffs' motion, except insofar as it is moot, is denied.

Background

This action was filed in the days before the November 2, 2010, general election by several individual and institutional Plaintiffs against the

Minnesota Secretary of State and Hennepin and Ramsey county election officials. The goal of the suit was to prevent the Defendants from prohibiting voters from wearing Plaintiff Election Integrity Watch's "Please I.D. Me" buttons as well as hats and t-shirts bearing the insignia and slogans of Plaintiff North Star Tea Party Patriots to the polls.

At the center of the case, then, is Minn. Stat. § 211B.11, subd.1. That provision of state law reads in relevant part as follows:

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day. This section applies to areas established by the county auditor or municipal clerk for absentee voting as provided in chapter 203B.

After filing their Complaint, the Plaintiffs quickly sought a temporary restraining order and preliminary injunction. The Court denied the motion on the eve of the general election.

Virtually immediately afterward, an individual in Secretary Ritchie's office sent an email to all of the county elections officers in the state. Attached to that email was a memorandum, which the parties refer to as the Election Day Policy. It reads as follows (emphasis in original):

> Please use the following process when dealing with an individual who is displaying political or campaign material in the polling place.
>
> 1. Minnesota law prohibits persons from wearing "political badges, political buttons, or other political insignia" or displaying campaign material within the polling place.
>
> 2. Election judges have the authority to decide what is "political." Examples include, but are not limited to:
>
> - Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.
>
> - Any item ir cluding the name of a candidate at any election.

- Any item in support of or opposition to a ballot question at any election.

- Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).

- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

3. If a person is wearing political material, you should do the following:

- Explain that state election law prohibits displaying political materials in the polling place. (Minnesota Statutes 211B.11, subdivision 1.)

- Ask the individual to either cover up or remove the political material while in the polling place.

- If they refuse, explain that eligible voters will be allowed to vote, but any refusal will be recorded and referred to appropriate authorities.

> 4. Even if a voter refuses to do so, you must permit any eligible voter to receive a ballot and vote.
>
> 5. Record the name and address of a voter from the polling place roster in the incident log, along with a brief description of the item (button, hat, t-shirt, etc.) that the voter refused to remove or cover up.
>
> 6. Election judges and official challengers are prohibited from displaying political or campaign material in the polling place. If they refuse to remove the political or campaign material, you can ask them to leave.

After the general election was held, the Plaintiffs filed an Amended Complaint asserting three claims under 42 U.S.C. § 1983: at Count I, for a violation of their First Amendment rights; at Count II, for a violation of their right to Due Process under the Fourteenth Amendment; and at Count III, for a violation of their right to Equal Protection under the Fourteenth Amendment. The Plaintiffs also assert in Count IV that Minn. Stat. § 211B.11, subd. 1 is unconstitutional under the First Amendment.

The Defendants subsequently moved to dismiss the Amended Complaint, with three motions filed, respectively, by Secretary Ritchie, the Hennepin County election officials, and the Ramsey County election officials. In April of 2011, the Court granted those motions, finding that the Plaintiffs' First

Amendment challenges failed under both facial and as-applied analyses, while also rejecting their Due Process and Equal Protection claims.

The Plaintiffs appealed the dismissal of their First Amendment and Equal Protection claims. In a decision issued in March of 2013, the Eighth Circuit affirmed the dismissal of the Equal Protection claim and the First Amendment facial challenge, but reversed and remanded the First Amendment as-applied challenge. *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013).

Following that decision, the Plaintiffs filed a petition for a writ of certiorari with the Supreme Court, and the remand proceedings in the district court were stayed pending its outcome. The Plaintiffs' certiorari petition was denied in December of 2013, and after the parties stipulated to the lifting of the stay in July of 2014, Secretary Ritchie filed the instant motion.

Discussion

There are two aspects to the motion that Ritchie has brought. First, Ritchie argues that he should be dismissed from the case on Eleventh Amendment immunity and standing grounds under Federal Rule of Civil Procedure 12. In the alternative, Ritchie argues that summary judgment is warranted because the Plaintiffs' as-applied First Amendment challenge fails on its merits under the Rule 56 standard.

The Court considers both of these arguments in turn.

I. Eleventh Amendment immunity and standing.

On the Rule 12 portion of his motion, Ritchie argues that he is not a proper defendant for two reasons: first, because the Amended Complaint does not contain sufficient factual content to establish that the Plaintiffs have standing to sue him; and second, because the Amended Complaint does not seek the only form of relief – prospective injunctive relief – that is available against a state official being sued in his official capacity under the Eleventh Amendment and the *Ex Parte Young* doctrine.

This is unpersuasive. Ritchie previously made the same Eleventh Amendment immunity argument on the motion to dismiss that he filed in December of 2010. In the decision that issued in April of 2011, the Court did not reach that issue in light of its determination that the case as a whole could not go forward because the Amended Complaint failed to state a claim upon which relief can be granted. This was consistent with Eighth Circuit precedent. *E.g.*, *Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe*, 578 F.3d 753, 763 n.14 (8th Cir. 2009) (noting that "we need not decide whether [the defendant] would be entitled to claim sovereign immunity under the Eleventh Amendment" where the complaint is dismissed for failure to state a claim under Rule 12(b)(6)).

When the Plaintiffs appealed the dismissal of the Amended Complaint, Ritchie pressed his immunity argument anew before the Eighth Circuit, while also raising his standing challenge for the first time. Brief and Addendum of Appellee Mark Ritchie at 22-35, *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (No. 11-2125). In its decision, the Eighth Circuit did not address either of these arguments, but did "reverse and remand the [Plaintiffs'] as-applied First Amendment claim" – as to all Defendants – "so that [this Court] may '(1) properly analyze the motion as a request for summary judgment through application of the standards articulated in Rule 56 and (2) give the parties sufficient opportunity to create an acceptable record . . . .'" *Minnesota Majority*, 708 F.3d at 1059 (quoting *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 788 (8th Cir. 2007)).

The Eighth Circuit could not have ordered what it did – that the case proceed in the district court, without Ritchie's dismissal – if either of his arguments had merit. As Ritchie correctly notes, standing is a "threshold question" that bears on the federal courts' jurisdiction to hear a case. *281 Care Committee v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011). As such, Ritchie was free to raise standing for the first time on appeal. *See Constitution Party of S.D. v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011). When he did so, the Eighth Circuit was obliged to consider the issue "before all other questions." *Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Trust Co.*, 640 F.3d 821, 825 (8th Cir. 2011) (quoting *Ginters v. Frazier*, 614 F.3d 822, 826 (8th Cir. 2010)).

In addition, the Eleventh Amendment does not simply protect states and state officials from liability; where it applies, it grants them a constitutional "right not to be sued in federal court." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144- 46 (1993). Because "the value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds past motion practice," a court may not allow a case to proceed against a defendant who has a valid Eleventh Amendment defense. *Id. See also Edelman v. Jordan*, 415 U.S. 651, 678 (1974) ("[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court[.]").

For these reasons, the rejection of Ritchie's standing and immunity arguments is the sine qua none of, and thus implicit in, the Eighth Circuit's disposition of the Plaintiffs' appeal and the remand it ordered. This Court is bound by that determination.

The Rule 12 portion of Ritchie's motion is therefore denied.

II. Summary judgment.

In the alternative to his Rule 12 arguments, Ritchie argues that the only claim that remains in this case—the Plaintiffs' as-applied First Amendment challenge to Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy—fails under the Rule 56 summary judgment standard.

In reviewing the Court's 2011 dismissal of that claim on the Defendants' initial round of motions under Rule 12(b)(6), the Eighth Circuit explained that "[u]nder the First Amendment, the statute and Policy are constitutional as applied to [the Plaintiffs] if their application to [them] is viewpoint neutral and 'reasonable in light of the purpose which the forum at issue serves.'" *Minnesota Majority*, 708 F.3d at 1059 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). On the first prong of that analysis, the Eighth Circuit affirmed that both the statute and the Policy are viewpoint neutral: the statute "applies to all political material, regardless of viewpoint [and] does not define 'political' to include or exclude any view," *id.* at 1057, while the Policy likewise "do[es] not exclude any party, material, or group from the Policy's application and do[es] not favor or disfavor any view," *id.* at 1059.

On the second prong, however, the Eighth Circuit found that the Court had relied on "matters outside the pleadings"—in contravention of Rule 12(b)(6)—for its conclusion that the Defendants reasonably applied the statute and Policy to the Plaintiffs. Therefore, the Eighth Circuit, as noted above, "revers[ed] and remand[ed] the as-applied First Amendment claim to the district court so that it may '(1) properly analyze the motion as a request for summary judgment through application of the standards articulated in Rule 56 and (2) give the parties sufficient opportunity to create an acceptable record . . . .'" *Id.* (quoting *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 788 (8th Cir. 2007)).

Accordingly, Ritchie has moved for summary judgment here. Under Rule 56, summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant must support his assertion that there is no genuine dispute either "by citing to particular parts of materials in the record" or by showing that the nonmovant "cannot produce admissible evidence to" create a genuine dispute. *Id.* (c)(1). This record evidence "and all fair inferences from it" are viewed "in the light most favorable to the non moving party." *Johnson v. Blaukat*, 453 F.3d 1108, 1112 (8th Cir. 2006).

To be entitled to judgment as a matter of law, Ritchie must establish that excluding the Plaintiffs' buttons and apparel from the polls is "reasonable in light of the purpose which [that] forum . . . serves." *Minnesota Majority*, 708 F.3d at 1059 (citation omitted). The Eighth Circuit determined that "[t]he state has a legitimate interest in 'maintain[ing] peace, order, and decorum' in the polling place," as well as a "compelling interest in 'protecting voters from confusion and undue influence' and 'preserving the integrity of its election process.'" *Id.* at 1057 (citations omitted).

For summary judgment to be granted, then, Ritchie must use the factual record to show that the Defendants' application of the statute and the Policy to the Plaintiffs is reasonably related to these state interests. In other words, the question is whether Ritchie has borne his burden of identifying undisputed or indisputable facts in the record that would

demonstrate that excluding the Plaintiffs' buttons and apparel from the polling place is rationally related to the state's interests in maintaining the decorum of the polls, preserving the integrity of elections, and protecting voters from confusion and undue influence.

A. "Please I.D. Me" buttons.

With regard to the "Please I.D. Me" buttons, Ritchie has satisfied that burden. Ritchie points to a printout of a page from Election Integrity Watch's website detailing its "Action Plan" for the 2010 general election. That page contains the following instructions:

> When you go to vote on November 2, wear your Election Integrity Watch button and show your photo ID when you sign-in [sic] to vote. While Minnesota does not require an individual to show an ID, let's act like it does. This simple act of showing an ID will likely result in a spontaneous reaction from others in line behind you to show their ID as well. Any person in line thinking about committing voter impersonation will likely be dissuaded from doing so. (Although polls show that over 80% of Minnesotans support requiring a photo ID to vote, this measure has been repeatedly block [sic] by leaders in the Minnesota state legislature.)[1]

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[1] The Plaintiffs themselves submitted a printout of this "Action Plan" along with other documents in support of their Motion for a Temporary Restraining Order and Preliminary

Furthermore, an additional printout from the website notes that Minnesota Voters Alliance—one of Election Integrity Watch's three constituent organizations (along with Minnesota Majority and the North Star Tea Party Patriots) and a co-Plaintiff with it here, Amended Complaint ¶ 10—is "currently working to pass voter photo ID [requirements] in both state and city government."[2]

The Plaintiffs do not dispute this evidence in any way, whether as to its meaning, its authenticity or admissibility, or on any other ground. *See* Fed. R. Civ. P. 56(c)(1)(B) (requiring "a party asserting that a fact . . . is genuinely disputed" to "show[] that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact").

The undisputed evidence before the Court, then, is both that Plaintiff Election Integrity Watch intended that their "Please I.D. Me" buttons be used as part of an orchestrated effort to falsely intimate to voters in line at the polls that photo identification is

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Injunction at the very outset of this case. *See* Kaardal Declaration Ex. 5 at 13, ECF No. 8-6.

At oral argument, the Court requested that the Plaintiffs file a letter indicating whether those materials were provided to or otherwise brought to the attention of the Eighth Circuit on appeal. *See* Eighth Circuit R. 30A (governing the parties' preparation and submission of the designated record on appeal). The Plaintiffs submitted a letter that was nonresponsive to the Court's request.

[2] In the 2012 general election, Minnesota voters rejected a constitutional amendment that would have required photo identification for voting.

required in order to vote in Minnesota, and that Plaintiff Election Integrity Watch – whose name, website, and phone number are featured prominently on the buttons – is connected to a campaign that aims to change state and local laws such that voters would be required to present photo identification at the polls. The Plaintiffs offer nothing in the way of evidence or argument to counter the obvious conclusion that flows from these facts: that precluding the Plaintiffs from wearing these buttons in the polling place – whether a voter identification measure is on the ballot or not – is rationally related to the state's interests in protecting voters from confusion and undue influence and in preserving the decorum of the polls and the integrity of elections.

The Plaintiffs do argue that the Eighth Circuit remanded the case with directions for the parties to "engage in the discovery process[,] including the requisite demands of Federal Rule of Civil Procedure 26." According to the Plaintiffs, "[t]o short-circuit the [discovery] process" – such as by granting any aspect of Ritchie's motion here – "is to invite rebuke from the appellate court."

The Plaintiffs' position, however, is not true to the Eighth Circuit's decision. In remanding the First Amendment as-applied claim, the Eighth Circuit cited Rule 12(d) and instructed the Court to "properly analyze *the motion*" – i.e., the Defendants' Rule 12(b)(6) motions – "as a request for summary judgment [and] give the parties sufficient opportunity to create an acceptable record." *Minnesota Majority*, 708 at 1059 (emphasis added). Neither Rule 12(d) nor the Eighth Circuit's decision contains any

requirement that the Court defer disposition until full discovery has been had in accordance with Rule 26. Instead, Rule 12(d) requires only that the nonmovant be put on notice that the motion before the Court will be considered under the Rule 56 standards, such that the nonmovant has "a reasonable opportunity to present all the material that is pertinent to th[at] motion."

Because Ritchie filed this portion of his motion explicitly as a motion for summary judgment, there can be no doubt that the Plaintiffs have been given the requisite notice and have had ample opportunity to submit whatever material they deem relevant to the Court's decision. Despite that opportunity, the Plaintiffs offered nothing to rebut Ritchie's summary judgment argument with respect to the "Please I.D. Me" buttons.

That said, the Plaintiffs do argue – in fact, they filed a separate motion of their own to this effect – that the Court should deny or defer ruling on Ritchie's summary judgment motion on the ground that "discovery will provide rebuttal evidence to [his] claim that there are no genuine issues of fact." To obtain a continuance or other relief under Rule 56(d), the party opposing summary judgment must show that the motion is premature by "filing an affidavit affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 894 (8th Cir. 2014) (internal quotation and citations omitted).

The Plaintiffs' affidavit and arguments are inadequate to warrant Rule 56(d) relief. According to their affidavit, the Plaintiffs seek discovery on the following issues:

- "the number of times an election judge has entered the name of a person in a precinct log to be reported to appropriate authorities under the Secretary's election day policy (of November 2010) since November 2010 and whether the Secretary obtained reports or was kept abreast of those log entries";

- "whether the Secretary or any election judge failed to identify for possible civil or criminal prosecution organizations known to the Secretary to endorse candidates who wore or may have worn apparel or buttons supporting a particular political philosophy or position held by a candidate on the ballot or ballot question";

- "whether there were further oral or written communications between the Secretary and election managers or others regarding the spot enforcement of Minnesota Statute § 211B.11 of

the Secretary's election day policy";

- "whether there were further oral or written communications between the Secretary and county attorneys regarding the spot enforcement of Minnesota Statute § 211B.11 of the Secretary's election day policy";

- "what information the Secretary of State received from County Auditors, Election Managers, or County Attorneys or other officials since November 2010 related to the enforcement of the directive disseminated to county auditors and election manages in November 2010";

- "how the Secretary determined that inert, passive wearing of apparel is disruptive or has the potential of being disruptive in a polling place";

- "what interests of the State the Secretary is protecting as it relates to inert, passive wearing of apparel as it applies to, for instance, 'Liberty' or 'Don't read on me'";

- "the specific 'rational basis' of the Secretary of State to direct election judges o report perceived offenders of Minnesota Statute § 211B.11. The basis does not appear to be articulated in the Secretary of State's motion to dismiss or in the alternative for summary judgment";

- "how the Secretary perceives th[e] 'fact' [that the U.S. House of Representatives recognized a Tea Party caucus consisting entirely of Republican members in July 2010] and how it is applied to the election day policy it advocated and continues to advocate."

None of these matters have any relevance to the crux of Ritchie's motion with respect to the "Please I.D. Me" buttons. The material facts at issue are that Plaintiff Election Integrity Watch intended that its buttons be used in an effort to mislead voters about voter identification requirements at the polls, and that Election Integrity Watch and the buttons are tied to a campaign to change state and local elections laws with respect to those requirements. Because the Plaintiffs do not contest those facts, and the discovery they seek is irrelevant to them, Ritchie has shown that prohibiting the Plaintiffs from wearing the buttons to the polls is rationally related to the state's legitimate interests in protecting voters from confusion and undue influence, ensuring order and decorum at the

polls, and safeguarding the integrity of the voting process.

As to the portion of the as-applied First Amendment claim that relates to the "Please I.D. Me" buttons, then, Ritchie's motion for summary judgment is granted and the Plaintiffs' Rule 56(d) motion is denied.

B. North Star Tea Party Patriots' hats and t-shirts.

However, the portion of Ritchie's summary judgment motion that relates to the North Star Tea Party Patriots' apparel is a different matter. As with the analysis of the "Please I.D. Me" buttons, the relevant question here is whether Ritchie has borne his burden of identifying undisputed or indisputable facts in the record that would demonstrate that prohibiting the Plaintiffs from wearing the North Star Tea Party Patriots' apparel to the polling place is rationally related to the state's interests in maintaining the decorum of the polls, preserving the integrity of elections, and/or protecting voters from confusion and undue influence.

He has not. Ritchie only points to "[d]ocumentation pertaining to the Congressional Tea Party Caucus," with no explanation of its relevance or analysis of how it could demonstrate the absence of a genuine dispute of material fact. Ritchie has thus failed to satisfy his burden of establishing his entitlement to summary judgment with respect to the portion of the First Amendment as-applied claim relating to the North Star Tea Party Patriots' apparel.

See Fed. R. Civ. P. 56(c)(1) (requiring the "party asserting that a fact cannot be . . . genuinely disputed [to] support the assertion"); *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 393 (8th Cir. 1986) ("Where the moving party fails to satisfy its burden to show initially the absence of a genuine issue concerning any material fact, summary judgment must be denied even if no opposing evidentiary matter is presented.").

This aspect of Ritchie's motion is therefore denied without prejudice. Because of that ruling, the aspect of the Plaintiffs' Rule 56(d) motion bearing on these issues is moot.

Based on the record, files, and proceedings herein, and for the reasons discussed above, IT IS ORDERED THAT:

1. Defendant Mark Ritchie's Motion to Dismiss or for Summary Judgment [ECF No.110] is GRANTED IN PART and DENIED IN PART consistent with the memorandum above.

2. Plaintiffs' Motion for an Order under Fed. R. Civ. P. 56(d) [ECF No. 117] is DENIED IN PART and DENIED AS MOOT IN PART consistent with the memorandum above.

Dated: October 15, 2014.

s/Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

United States Court of Appeals
For the Eighth Circuit

No. 11-2125

Minnesota Majority; Minnesota Voters Alliance; Minnesota Northstar Tea Party Patriots; Election Integrity Watch; Susan Jeffers, individually and as an election judge; Dorothy Fleming; Jeff Davis; Dan McGrath; Andy Cilek

Plaintiffs - Appellants

v.

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County; Rachel M. Smith, in her official capacity as the Elections Manager for Hennepin County; Mike Freeman, in his official capacity as Hennepin County Attorney; John J. Choi, in his official capacity as Ramsey County Attorney; Mark Ritchie, in his official capacity as Secretary of State; Susan Gaertner, in her individual capacity

Defendants - Appellees

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: February 14, 2012
Filed: March 6, 2013 (Corrected 03/13/2013)

Before GRUENDER, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

Several groups interested in electoral and governmental reform sued the Secretary of State, and Ramsey and Hennepin county election officials ("Minnesota"). Minnesota moved for dismissal, which the district court granted. The groups appeal as to the claims under the First Amendment and the Equal Protection clause.[1] Jurisdiction being proper under 28 U.S.C. § 1291, this court affirms in part, reverses in part, and remands.

I.

Election Integrity Watch ("EIW") is comprised of Minnesota Majority, Minnesota Voters Alliance, and the North Star Tea Party Patriots. These groups assert as their mission the improvement of government and governmental processes. Minnesota Majority and Minnesota Voters Alliance advocate electoral reforms. None is a political party, and none endorsed a candidate or ballot issue in the November 2010 election. Before the election, EIW produced "Please I.D. Me" buttons. North Star Tea Party Patriots produced hats and t-shirts with Tea Party logos. The t-shirts also featured either a drawing of a shield or one of several slogans, including: "Don't tread on me," "Liberty," "We'll Remember in November," and "Fiscal Responsibility, Limited Government, Free Markets."

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[1] The groups assert the same claims under the Minnesota Constitution. These claims are evaluated using the same standard as those under the U.S. Constitution. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 516 (Minn. 2012).

Shortly before the November 2010 election, EIW sought to enjoin the enforcement of the third sentence of Minn. Stat. § 211B.11, subd. 1: "A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." Violation of this sentence is a petty misdemeanor. Minn. Stat. § 211B.11, subd. 4. The first sentence of Minn. Stat. § 211B.11, subd. 1 generally prohibits displaying campaign material or trying to persuade a voter about a candidate or ballot question within a polling place or within 100 feet of the polling place's building.

On the eve of the election, the district court denied a temporary restraining order. Minnesota then distributed an Election Day Policy explaining the statutory ban on political materials in polling places. The Policy gives examples of political materials, including: "[i]ssue oriented material designed to influence or impact voting (including specifically the 'Please I.D. Me' buttons)" and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." The Policy instructed election judges to ask persons wearing political material to cover or remove it. If they refused, the Policy instructed election judges to record their names and addresses for potential prosecution but to permit them to vote.

At least three EIW members were affected by the Policy. One was asked to cover or remove his t-shirt. Another who refused to cover or remove his button had his name and address recorded. Yet another who was wearing both a t-shirt and a button was delayed several hours before voting. EIW asserts

that the fear of prosecution stopped others from displaying the apparel. Still others who were wearing materials from EIW and other similar organizations voted without incident.

After the election, EIW amended its complaint to challenge the constitutionality of Minn. Stat. § 211B.11, subd. 1 and the Policy issued under it. The district court granted Minnesota's motion to dismiss.

This court reviews de novo the grant of a motion to dismiss for failure to state a claim. *Butler v. Bank of Am., N.A.*, 690 F.3d 959, 961 (8th Cir. 2012). Reviewing a dismissal under Rule 12(b)(6), this court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts most favorably to the complainant. *Id.* Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Twombly*, 550 U.S. at 555.

A court reviewing a motion to dismiss may also "consider some public records, materials that do not contradict the complaint, or materials that are 'necessarily embraced by the pleadings.'" *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008), *quoting Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). The complaint refers to the Policy. The parties rely on it in their briefs. No party disputes its contents or authenticity. No party

challenged the district court's consideration of it, and this court will likewise consider it as "necessarily embraced by the pleadings."

II.

EIW alleges that Minn. Stat. § 211B.11, subd. 1 is facially unconstitutional. To succeed in a typical facial attack, EIW would have to establish "that no set of circumstances exists under which [§ 211B.11, subd. 1] would be valid," or that the statute lacks any "plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, ___, 130 S. Ct. 1577, 1587 (2010). A First Amendment case is "a second type of facial challenge": a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.*, *quoting Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008). "To be facially invalidated under this doctrine, the overbreadth of an ordinance affecting both conduct and pure speech must be both 'real' and 'substantial' in relation to its 'plainly legitimate sweep.'" *Excalibur Grp., Inc. v. City of Minneapolis*, 116 F.3d 1216, 1224 (8th Cir. 1997), *quoting New York v. Ferber*, 458 U.S. 747, 769-70 (1982).

The First Amendment prohibits laws "abridging the freedom of speech." U.S. Const. amend. I. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal*

Def. & Educ. Fund, Inc., 473 U.S. 788, 799-800 (1985). The Supreme Court has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* at 800.

In *Burson v. Freeman*, 504 U.S. 191 (1992), a Tennessee statute prohibited "campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" within 100 feet of the entrance to a polling place and the building in which it was located. *Burson*, 504 U.S. at 193-94. The plurality noted that the "campaign-free" zones included sidewalks and streets adjacent to the polling places, thus banning speech in public forums. *Id.* at 196 & n.2. Because it banned content-based speech in public forums, the Tennessee statute was subject to strict scrutiny, which requires that the state show that the restriction is necessary and narrowly tailored to achieve a compelling state interest. *Id.* at 198-99. The Supreme Court ruled that this was the rare case where a law survived strict scrutiny because of the long history, substantial consensus, and "simple common sense" showing that restrictions around polling places are necessary to protect the states' compelling interests in preventing voter intimidation and election fraud. *Id.* at 206, 211.

EIW's challenge includes the first sentence of Minn. Stat. § 211B.11, subd. 1 (prohibiting solicitation inside or within 100 feet of the polling place). To that

extent, the *Burson* case defeats a facial attack on the first sentence of Minn. Stat. § 211.B11, subd. 1.

The third sentence of the Minnesota statute applies only within ("at or about") the polling place. Minn. Stat. § 211B.11, subd.1 ("A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."). A polling place is a nonpublic forum. *See, e.g., PG Publ'g Co. v. Aichele*, 705 F.3d 91, ___ n.10, 2013 WL 150138, at *5 n.10 (3d Cir. Jan. 15, 2013); *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001); *see also Poniktera v. Seiler*, 104 Cal. Rptr. 3d 291, 302 (Cal. Ct. App. 2010) ("The comments of both Justice Scalia's concurring opinion in *Burson*, as well as the dissent, confirm our reading that *Burson* understood it was *not* approving the application of strict scrutiny to restrictions on conduct *within* the confines of the polling station . . . .").

EIW believes that by Eighth Circuit precedent, a polling place is a public forum. This court has stated in passing that "the area containing the voting booths" was "a designated public forum" on the date it was being used for voting. *Embry v. Lewis*, 215 F.3d 884, 888 (8th Cir. 2000). The *Embry* court was not performing a forum analysis of the polling area for free speech purposes, as shown by its lack of analysis or citation of precedent on this point. The *Embry* court did not cite *Burson*. The use of *Embry*'s passing comment to assert that a polling place is a public forum has rightly been rejected in another circuit. *See United Food & Commercial Workers Local 1099 v. City*

of Sidney, 364 F.3d 738, 749 (6th Cir. 2004). The polling place itself is a nonpublic forum.

A restriction on speech in a nonpublic forum is not subject to strict scrutiny and is permissible if it is viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-49 (1983). The third sentence of the Minnesota statute is viewpoint neutral because it applies to all political material, regardless of viewpoint. It does not define "political" to include or exclude any view.

Restrictions on speech in a nonpublic forum, to be valid, must also be "reasonable in light of the purpose which the forum at issue serves." *Id.* at 49. The state has a legitimate interest in "maintain[ing] peace, order and decorum" in the polling place. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). A state also has a compelling interest in "protecting voters from confusion and undue influence" and "preserving the integrity of its election process." *Burson*, 504 U.S. at 199 (citations and internal quotation marks omitted). The statute prohibits the wearing of a "political badge, political button, or other political insignia" in the polling place.[2] The Supreme Court has held that a statute restricting speech "related to a political campaign" in the *public* forum *outside* the polling place survives strict scrutiny. *Id.* at 196-97, 211.

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[2] EIW notes that the statute does not define "political." EIW, however, does not include the word "vague" or "vagueness" in its argument to this court. EIW has waived its vagueness challenge by failing to brief it to this court. *United States v. Frook*, 616 F.3d 773, 777 n.2 (8th Cir. 2010).

Because a statute restricting speech related to a political campaign outside the polling place survives strict scrutiny, the Minnesota statute, to the extent it restricts speech about a political campaign inside the polling place, is "reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n*, 460 U.S. at 49. The "decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808; *see also Marlin*, 236 F.3d at 720 ("That narrower regulations might be as effective or more so . . . does not invalidate the means . . . chosen.") The statute here has a "plainly legitimate sweep" when it prohibits speech about a political campaign.[3]

EIW's complaint states that Minnesota has applied the statute to material that does not attempt to persuade or influence voters to vote for or against any particular political party, candidate, or question on the ballot. Other courts have applied *Burson* to uphold bans on material unrelated to any issue on the ballot. *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1218-19 (11th Cir. 2009) (per curiam) (relying on *Burson* to find constitutional a statute that prohibited solicitation

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[3] The dissent suggests that Minnesota's action is unconstitutional absent examples of actual disruption. That showing is not required. *See, e.g., Burson*, 504 U.S. at 206-07; *Perry Educ. Ass'n*, 460 U.S. at 52 & n.12; *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1220 & n.15 (11th Cir. 2009) (per curiam) ("The *Burson* plurality opinion teaches us that the State need not wait for actual interference or violence or intimidation to erupt near a polling place for the State to act.").

that targeted voters exiting polling places and that concerned matters unrelated to any issue on the ballot); *Schirmer v. Edwards*, 2 F.3d 117, 122-23 (5th Cir. 1993) (finding constitutional a "total ban on politicking," including "buttons and T-shirts," within a 600-foot radius of the polling place).[4] Even if Minnesota acted unreasonably in applying its statute to some material, the complaint does not allege that there were a "substantial number" of such unreasonable applications in relation to the statute's reasonable applications. *See Wash. State Grange*, 552 U.S. at 449 n.6. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

EIW has failed to state a facial claim under the First Amendment against Minn. Stat. § 211B.11, subd. 1.[5]

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[4] Contrary to the dissent's assertion, it is of no consequence that *Browning* and *Schirmer* address laws regulating exit polling (after citizens already voted). "[C]ommotion tied to exit solicitation is as capable of intimidating and confusing the electorate and impeding the voting process – even deterring potential voters from coming to the polls – as other kinds of political canvassing or political action around the polls." *Browning*, 572 F.3d at 1219. Moreover, both statutes passed strict scrutiny (more exacting than here) asserting state interests *identical* to those in *Burson*: protecting the voters from confusion and undue influence, and preserving the integrity and reliability of elections. *Id.*; *Schirmer*, 2 F.3d at 120.

[5] EIW's new argument that some state officials are Democrats (and its organization's members are not) is not enough to state a plausible claim for First Amendment retaliation.

III.

EIW claims that the statute and the Election Day Policy are unconstitutional as applied. "An as-applied challenge consists of a challenge to the statute's application only as-applied to the party before the court." *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004). "If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable." *Id.; see Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 893 (2010) (holding that the distinction between a facial challenge and an as-applied challenge "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint").

A.

Under the First Amendment, the statute and Policy are constitutional as applied to EIW if their application to EIW is viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n*, 460 U.S. at 49. As discussed, the statute is viewpoint neutral. The Policy is also viewpoint neutral. It recites as examples of "political": "the name of political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties"; items "in support of or opposition to" any ballot question; "[i]ssue oriented material designed to influence or impact voting (including specifically the 'Please I.D. Me' buttons"; and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org,

and so on)." The examples in the Policy do not exclude any party, material, or group from the Policy's application and do not favor or disfavor any view.

As to the reasonableness of the statute's and Policy's application to EIW, the district court considered "matters outside the pleadings." *See* Fed. R. Civ. P. 12(d). For example, the district court found that "[t]he language on the ["Please I.D. Me"] button intimates that government-issued identification should be – or is – required in order to vote in Minnesota. This intimation could confuse voters and election officials and cause voters to refrain from voting because of increased delays or the misapprehension that identification is required." The complaint does not include these facts; the district court "must have been referencing argument and evidence from some source outside the four corners of the complaint." *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 787 (8th Cir. 2007). Because the district court considered "matters outside the pleadings," it should have evaluated the motion under Rule 56. Fed. R. Civ. P. 12(d); *McAuley*, 500 F.3d at 788. This court reverses and remands the as-applied First Amendment claim to the district court so that it may "(1) properly analyze the motion as a request for summary judgment through application of the standards articulated in Rule 56 and (2) give the parties sufficient opportunity to create an acceptable record . . . ." *McAuley*, 500 F.3d at 788.

B.

EIW argues that the Minnesota statute and Policy denied it equal protection in violation of the

Fourteenth Amendment. "The Equal Protection Clause generally requires the government to treat similarly situated people alike." *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994), *citing City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). To survive dismissal, EIW must allege that Minnesota treated it differently than similarly situated people. *Ganley v. Minneapolis Park & Recreation Bd.*, 491 F.3d 743, 747 (8th Cir. 2007).

EIW argues that election judges selectively enforced the statute and the Policy. Even if the complaint adequately described how the statute and Policy were enforced differently among similarly situated people (including among people who wore the "Please I.D. Me" buttons), the complaint must also allege that Minnesota caused the selective enforcement. *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990) ("Liability under § 1983 requires a causal link to, and direct responsibility for, the deprivation of rights."). While causation is generally a question of fact, this court may decide the question as a matter of law where "the question is so free from doubt as to justify taking it from the [fact finder]." *Parrish v. Ball*, 594 F.3d 993, 1000 (8th Cir. 2010) (alteration in original), quoting *Ricketts v. City of Columbia*, 36 F.3d 775, 779-80 (8th Cir. 1994).

Because the statute and Policy do not "affirmatively sanction" selective enforcement, this court analyzes the claim against the municipalities and the official capacity defendants under the "deliberate indifference" standard of *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). *Szabla v. City of Brooklyn Park, Minn.*, 486 F.3d 385, 390 (8th Cir.

2007) (en banc) ("Where a policy is constitutional on its face, but it is asserted that a municipality should have done more to prevent constitutional violations by its employees, a plaintiff must establish the existence of a 'policy' by demonstrating that the inadequacies were a product of deliberate or conscious choice by policymakers. The standard of fault in that situation is 'deliberate indifference' to constitutional rights." (internal citation omitted)). The complaint alleges only that the Policy's "standardless discretion" resulted in selective enforcement. The Policy's delegation of discretion to election judges did not, without more, cause selective enforcement. *See Dick v. Watonwan Cnty.*, 738 F.2d 939, 942-43 (8th Cir. 1984) (holding that a municipality's policy giving discretion to subordinates did not subject the municipality to liability for the subordinates' errors of judgment).

This court has not reviewed a suit against an individual-capacity defendant who wrote a policy so standardless that it caused selective enforcement. The closest analogy is suing an individual-capacity defendant for failure to train subordinates, causing selective enforcement. A supervisor may be individually liable for failure to train subordinates if it amounts to deliberate indifference to the rights of persons whom the subordinates harm. *Parrish*, 594 F.3d at 1002; *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996) (applying the same standard from official-capacity failure to train to the individual-capacity allegation). The same "deliberate indifference" standard applies in this case. The election supervisors' Policy that delegated discretion to election judges did not, without more, cause selective enforcement. *See Dick*, 738 F.2d at 942 ("The

Board might have chosen to adopt more detailed guidelines, and such rules might have averted the mistake that was made in this case, but the Board's decision to rely on its employees' judgment is certainly not unconstitutional in and of itself . . . .").

EIW has failed to allege that Minnesota caused selective enforcement of the facially neutral statute and Policy, and has therefore failed to state an equal protection claim.

* * * * * * *

The judgment of the district court is affirmed in part, reversed in part, and the case remanded for proceedings consistent with this opinion.

SHEPHERD, Circuit Judge, concurring in part and dissenting in part.

I am pleased to concur with the majority's decision holding (1) that the district court improperly considered matters outside the pleadings when dismissing the plaintiffs' as-applied challenge and (2) that the plaintiffs have failed to state an equal protection claim. Because I respectfully disagree with the majority's conclusion that the statutory restrictions, which ban the wearing of any political insignia, are reasonable in light of the need to maintain "peace, order, and decorum," to "protect[] voters from confusion and undue influence," and to "preserv[e] the integrity of its election process" in the polling place, I dissent from the affirmance of the district court's dismissal of the plaintiffs' claim that the statute is facially unconstitutional.

As the majority points out, for the speech restrictions in the polling place to survive constitutional scrutiny, the restrictions must be "viewpoint neutral and 'reasonable in light of the purpose which the forum at issue serves.'" *See supra* at 6 (*quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). "The state has a legitimate interest in 'maintain[ing] peace, order and decorum' in the polling place[,]" *supra* at 7 (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)), "in 'protecting voters from confusion and undue influence' and 'preserving the integrity of its election process.'" *Supra* at 7 (*quoting Burson v. Freeman*, 504 U.S. 191, 199 (1992)). I have no reservations about the majority's conclusion that the statute is viewpoint neutral or that under *Burson*, it is constitutional to restrict speech inside the polling place about either political campaigns or issues that are on the ballot.[6]

I do not, however, agree that *Burson* may be applied to this statute to uphold the restrictions on the wearing of any political insignia in the polling place. The Tennessee statute at issue in *Burson* stated:

> Within the appropriate boundary as established in subsection (a) [100 feet

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[6] I also agree with the majority that EIW has waived any vagueness challenge by failing to brief it to this court. The district court likewise determined "that the Amended Complaint does not allege that Minnesota Statues section 211B.11 is void for vagueness." (Order at 14-15.) It would appear, then, that plaintiffs are not barred from raising such a challenge in the future.

> from the entrances], and the building in which the polling place is located, the display of *campaign* posters, signs or other *campaign* materials, distribution of *campaign* materials, and solicitation of votes for or against any person or political party or position on a question are prohibited.

Id. at 193-94 (emphasis added) (brackets in original) (quoting Tenn. Code Ann. § 2-7- 111(b) (Supp. 1991)). The Supreme Court noted that "[w]hether individuals may exercise their free speech rights near polling places [under the Tennessee statute] depends entirely on whether their speech is related to a political *campaign*." *Id.* at 197 (emphasis added). In his dissent, Justice Stevens points out that the Tennessee statute "silences all campaign-related expression, *but allows expression on any other subject*: religious, artistic, commercial speech, *even political debate and solicitation concerning issues or candidates not on the day's ballot.*" *Id.* at 223 (Stevens, J., dissenting) (emphasis added).

The majority cites *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213 (11th Cir. 2009) (per curiam) and *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) as cases that applied *Burson* to uphold bans on material unrelated to any issue on the ballot. *Supra* at 8. In both of those cases, however, the focus of the restrictions was the prevention of harassment of voters by exit solicitors seeking voter signatures on petitions as voters left the polls. *See Browning*, 572 F.3d at 1218-19; *Schirmer*, 2 F.3d at 122-23. I fail to see how this broad restriction,

which prohibits a voter from wearing any political emblem, insignia, or slogan that is unrelated to an issue or candidate on the ballot, would rationally and reasonably help maintain the "peace, order, and decorum" of the polling place, "protect[] voters from confusion or undue influence," or "preserv[e] the integrity of [Minnesota's] election process."[7] Further, the record in this case is devoid of facts which demonstrate that any disruption of the "peace, order, and decorum" of the Minnesota election process has occurred by virtue of voters wearing a political emblem, insignia, or slogan that is unrelated to an issue or candidate on the ballot. Although the existence of a disruption is not necessary before the state imposes reasonable limitations on speech, had such facts existed, then perhaps I could agree that the restrictions are reasonable. Without further development of the record to reflect how these restrictions are reasonable limits on free speech which rationally relate to the state's interest in maintaining order and preserving integrity at the polling place, I cannot join in the majority's rejection of plaintiffs' constitutional challenge on facial grounds.

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[7] For example, how does the wearing of a button or shirt bearing an American flag or the Star of David, which could arguably be considered political under this statute, disrupt the "peace, order, and decorum" of the voting booth? I do not accept that the presence of a passive and peaceful voter who happens to wear a shirt displaying, for example, the words "American Legion," "Veterans of Foreign Wars," "AFL-CIO," "NRA," "NAACP," or the logo of one of these organizations (all of which have actively participated in the political process) somehow causes a disruption in the polling place or confuses or unduly influences voters.

Accordingly, I respectfully dissent from the majority's affirmance of the district court's dismissal of the plaintiffs' facial challenge as to the third sentence of Minnesota Statute § 211B.11, subd. 1. I would remand to allow the record to be developed regarding plaintiffs' facial challenge. Otherwise, I concur with the majority's opinion.

Filed Apr. 29, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota North Star Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dorothy Fleming, Jeff Davis, Dan McGrath and Andy Cilek,

Plaintiffs,

v.

Civil No. 10-4401 (JNE/SER)
ORDER

Joe Mansky in his individual and official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her individual and official capacity as the Elections Manager for Hennepin County, Mike Freeman in his individual and official capacity as Hennepin County Attorney, Susan Gaertner in her individual capacity, John J. Choi in his official capacity as Ramsey County Attorney, and Mark Richie in his individual and official capacity as Secretary of State,

Defendants.

Individual and institutional Plaintiffs assert violations of the United States and Minnesota constitutions against Defendants, Elections Managers of Ramsey and Hennepin Counties, County Attorneys for Ramsey and Hennepin Counties, and the Minnesota Secretary of State, in their individual and

official capacities.[1] In broad terms, the claims arise out of allegations that Minnesota Statutes section 211B.11, subdivision 1 (2010), which prohibits the wearing of political buttons, badges, and insignia in and around the polling place, is facially unconstitutional and that Defendants, in their implementation and enforcement of the statute, violated Plaintiffs' rights to free speech, association, vote, equal protection, and due process under both the United States and Minnesota constitutions. The case is before the Court on Defendants' motions pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Amended Complaint. For the reasons set forth below, the Court grants the motions.

I. BACKGROUND

On Monday, November 1, 2010, the Court heard Plaintiffs' motion for a Temporary Restraining Order (TRO) and preliminary injunction. Treating the motion as one for a TRO, the Court found that Plaintiffs were not likely to succeed on the merits of their claims and denied the motion. On November 18, 2010, after the November election took place, Plaintiffs filed the Amended Complaint. The institutional Plaintiffs, Minnesota Majority, Minnesota Voters Alliance, and Minnesota North Star Tea Party Patriots, assert that they are Minnesota

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[1] The Amended Complaint refers to Secretary of State Mark "Richie." The Secretary of State spells his last name "Ritchie" and the Court will refer to him by his correctly spelled name. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court substitutes John J. Choi for Susan Gaertner in her official capacity. Choi was sworn in as the Ramsey County Attorney on January 4, 2011.

501(c)(4) nonprofit organizations and that together they form a grass roots coalition called Election Integrity Watch (EIW). The individual Plaintiffs, Susan Jeffers, Jeff Davis, Dorothy Fleming, Dan McGrath, and Andy Cilek, are eligible voters in Ramsey or Hennepin County; Susan Jeffers is also an election judge in Ramsey County.[2] Plaintiffs allege that Minnesota Statutes section 211.B11, subdivision 1, and the way it was enforced, wrongfully prohibited or chilled the wearing of North Star Tea Party Patriots T-shirts and EIW buttons to the polls. The buttons state "Please I.D. Me" and include an image of an open eye, a telephone number, and a website address including the word "integrity." (Am. Compl. Ex. A) The T-shirts bear a "Tea Party Patriots" logo along with one of several slogans including "Don't Tread on Me" and "Fiscal Responsibility, Limited Government, Free Markets." (Am. Compl. Ex. B) The institutional Plaintiffs do not endorse candidates for election and, while the question of whether Minnesota law should be changed to require voters to identify themselves at the polling place is the subject of public

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[2] The Amended Complaint removed two of the original individual Plaintiffs and added Andy Cilek. Otherwise, the parties remain unchanged since the TRO. Though the parties do not dispute the issue of standing, the Court has the obligation to consider the issue independently. Because Cilek has standing on each of the claims in the Amended Complaint, *see St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006), the Court need not consider whether the other Plaintiffs have standing. *See Horne v. Flores*, 129 S. Ct. 2579, 2592-93 (2009); *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998) (finding that because health care appellees have standing it did not matter whether their unions also have standing).

and legislative debate, there was no issue relating to voter identification on the November 2, 2010, ballot.

Minnesota Statutes section 211B.11, subdivision 1 provides:

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day.

A complaint alleging a violation of section 211B must be filed with the Office of Administrative Hearings (OAH). After OAH has finally disposed of the complaint, the alleged violation can be prosecuted by a county attorney as a petty misdemeanor. Minn. Stat. § 211B.11, subd. 4.

For present purposes, the Court assumes that the allegations of the Amended Complaint, summarized below, are true. Plaintiff and election

judge Sue Jeffers approached Joe Mansky, Elections Manager for Ramsey County, asking about "rumors" she had heard about "Please I.D. Me" buttons and Tea Party T-shirts. Mansky told Jeffers that the buttons and Tea Party messages of any kind would be prohibited at the polls. Subsequently, but prior to November 2, Mansky told election judges that individuals at or "within 100 feet" of the polling place would be asked to cover any "political shirt, hat button, badge or insignia." He also stated that no individual would be denied the right to vote. Rachel Smith, Elections Manager for Hennepin County, and Secretary of State Ritchie subsequently adopted the same policy. The Amended Complaint alleges that this policy applied "particularly" to the "Please I.D. Me" buttons and Tea Party apparel. (Am. Compl. ¶¶ 57-59) Hennepin County Attorney Mike Freeman stated that poll watchers wearing buttons asking voters for identification "won't be allow[ed] in polling stations." (Am. Compl. ¶ 61) On October 30, 2010, Mansky drafted a memorandum on the subject of "Displaying Campaign Materials in the Polling Place" (Election Day Policy).[3] The Election Day Policy directed election judges who saw individuals wearing political materials to remove or cover the materials while "in the polling place." (*Id.*) Under the Election Day Policy

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[3] Each Defendant supplied a different copy of the Election Day Policy but each copy states an identical policy. The versions provided by Hennepin County and the Office of the Secretary of State are dated November 1, 2010. For ease of reference, the Court will refer to the version provided by Ramsey County. (Mansky and Gaertner's Mem. in Supp. Mot. Dismiss, Edison Decl., Ex. A)

> [e]lection judges have the authority to decide what is "political." Examples include, but are not limited to:
>
> - Any item including the name of a political party in Minnesota, such as Republican, DFL, Independence, Green, or Libertarian parties.
>
> - Any item including the name of a candidate at any election.
>
> - Any item in support of or opposition to a ballot question at any election.
>
> - Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).
>
> - Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

Even if individuals refused to remove or cover prohibited items, the Election Day Policy directed that they must be allowed to vote, though their names and addresses would be recorded and referred "to appropriate authorities." (*Id.*)

On election day, Jeff Davis, a registered voter in Ramsey County who had learned of this policy, was deterred from wearing a Tea Party T-shirt and a "Please I.D. Me" button. Dan McGrath, a registered voter in Hennepin County, wore a "Please I.D. Me" button. An election judge asked McGrath to cover the

button, McGrath refused, and the election judge obtained his name. Andy Cilek, also registered to vote in Hennepin County, wore both a "Please I.D. Me" button and a Tea Party T-shirt. Election judges "refused to allow Mr. Cilek to vote" on two occasions. Cilek did not vote "for over five hours."[4] One voter wearing a Tea Party T-shirt was "interrupted" "during the voting process" and asked to remove or cover his Tea Party T-shirt. He was warned that if he did not, he could be prosecuted. Some Hennepin County election judges allowed individuals, including Plaintiff Dorothy Fleming, to wear the "Please I.D. Me" buttons without asking them to cover or remove the buttons. In unidentified counties, unidentified voters were allowed to vote wearing buttons affiliated with the Sierra Club and Minnesota Common Cause. The Sierra Club endorses candidates and Minnesota Common Cause lobbies for legislation to reform the electoral process.[5]

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[4] Mr. Cilek was not, in fact, deprived of the right to vote. (Am. Compl. ¶ 105) At oral argument, Plaintiffs' counsel clarified that all of his clients voted. The "five hours" seems to have been the elapsed time between Mr. Cilek's first and second trips to the polling place. There is no allegation that he was detained or delayed at the polling place.

[5] The Amended Complaint also alleges that "[t]he Defendants admit" that they adopted a policy prohibiting EIW "Please I.D. Me" buttons and Tea Party apparel and that they "did not enforce or otherwise apply a similar policy to other groups." (Am. Compl. ¶ 117) This allegation alone, in the context of the Amended Complaint which is pleaded only against policy-level Defendants, is a "'naked assertion' devoid of 'further factual enhancements'" which does not state a viable claim for relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Aspects of Plaintiffs' Amended Complaint are somewhat imprecise or otherwise difficult to decipher. For example, the Amended Complaint alleges that the policy "exercises a standardless discretion over what expressive conduct is electioneering," when the word "electioneering," while it appears in Arizona's statute, *see Reed v. Purcell*, No. CV 10-2324, 2010 WL 4394289, at *1 (D. Ariz. Nov. 1, 2010); Ariz. Rev. Stat. § 16-515 (2010), does not appear in either the policy or the statute being challenged here. Nonetheless, the Court has determined that Plaintiffs' four-count Amended Complaint alleges: (1) that Minnesota Statutes section 211.B11, subdivision 1, is a facially unconstitutional restriction of First Amendment rights under the United States Constitution and parallel rights under the Minnesota constitution (Count IV); (2) that section 211B.11, as applied in the Election Day Policy adopted by Hennepin and Ramsey Counties and the Secretary of State, violated Plaintiffs' First Amendment rights, their constitutionally protected right to vote, and parallel rights under the Minnesota constitution (Counts I and IV); (3) that the Election Day Policy violated Plaintiffs' due process rights under both the United States and Minnesota constitutions (Count II); and (4) that the Election Day Policy deprived Plaintiffs of equal protection under both the United States and Minnesota constitutions (Count III).[6]

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[6] Plaintiffs repeatedly referenced a claim of retaliation in their memorandum and at oral argument, but the Amended Complaint does not refer to retaliation nor does it allege any facts regarding protected conduct or speech before or during the election which could have been the basis for retaliation. *See Altonen v. City of Minneapolis*, 487 F.3d 554, 559 (8th Cir. 2007).

II. DISCUSSION

When ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, a court must accept the facts alleged in the complaint as true and grant all reasonable inferences in favor of the plaintiff. *Crooks v. Lynch*, 557 F.3d 846, 848 (8th Cir. 2009). Although a complaint is not required to contain detailed factual allegations, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A court generally may not consider materials outside the pleadings when deciding a motion to dismiss under Rule 12(b)(6). *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008). The court may, however, "consider some public records, materials that do not contradict the complaint, or materials that are 'necessarily embraced by the pleadings.'" *Id.* (quoting *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)); *see In re K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 889 (8th

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The Court finds that Plaintiffs have not pleaded a retaliation claim.

Cir. 2002). The parties rely heavily on the written Election Day Policy in their memoranda and at oral argument, and they do not dispute the contents or authenticity of the document. Though the Election Day Policy was not attached to the pleadings, and the Amended Complaint makes reference to previously issued verbal iterations of the policy, no party has argued that consideration of the document will convert the motion to dismiss to a motion for summary judgment. At oral argument Plaintiffs clarified that it is their intent to "[i]n the very first instance, challenge this written policy with the State of Minnesota." Accordingly, the Court considers the Election Day Policy to be necessarily embraced by the pleadings and considers this to be the policy under attack in Plaintiffs' Amended Complaint. *See BJC Health Sys. v. Columbia Cas. Co.*, 348 F.3d 685 (8th Cir. 2003); *Porous Media Corp.*, 186 F.3d at 1079; *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997); *see also Pegram v. Herdrich*, 530 U.S. 211, 230 n.10 (2000). Additional documents were submitted by the parties but they are outside of the pleadings and thus are not considered in deciding the Rule 12(b)(6) motions. *See* Fed. R. Civ. P. 12(d).

A. Counts I and IV: The Constitutionality of Minnesota Statutes Section 211B.11

1. Facial Challenge

The Amended Complaint claims that Minnesota Statutes section 211B.11 is facially unconstitutional under both the United States and Minnesota constitutions. (Am. Compl. ¶ 1) Minnesota's guarantees of freedom of speech are

coextensive with those of the federal constitution and these claims are examined under the same standard. *See State v. Wiklund*, 589 N.W.2d 793, 798-801 (Minn. 1999). The statute is a content-based regulation because it only prohibits badges, buttons, and insignia with a political message. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992). Political speech "is at the heart of the protections of the First Amendment." *281 Care Committee v. Arneson*, No. 10-1558, slip op. at 19, n.3 (8th Cir. Apr. 28, 2011). Indeed, the protections afforded to political speech under the First Amendment are "difficult to overstate." *Id.* at 19 n.3 (citing *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Citizens United v. FEC*, 130 S. Ct. 876 (2010)). The level of scrutiny that the Court must use to evaluate the constitutionality of the restrictions in section 211B.11, subdivision 1, depends upon the forum in which the restrictions take place. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800-02 (1985). Traditional public fora include public streets, parks, and places that by either tradition or "government fiat have been devoted to assembly or debate." *Id.* In public fora, content-based restrictions are subject to strict scrutiny, i.e., they are prohibited unless necessary to serve a compelling state interest and narrowly tailored to achieve that interest. *Id.* Restrictions on speech in nonpublic fora are allowed as long as they are viewpoint neutral and reasonable in light of the purposes served by the forum. *Id.*

The Court will begin by assessing the first clause of section 211B.11, subdivision 1. It states that a person may not "display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100

feet" of polling locations. In *Burson v. Freeman*, the Supreme Court found that a substantively identical Tennessee law was constitutional. 504 U.S. at 193. The Tennessee law examined in *Burson* prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" within 100 feet of a polling place. *Id.* The *Burson* Court ruled that the law survived strict scrutiny as a "facially content-based restriction on political speech in a public forum." *Id.* at 198. There is no meaningful distinction between the Tennessee law and the first clause of section 211B.11.

The second part of section 211B.11, subdivision 1, restricts "political" material rather than "campaign" material and is geographically more limited because it applies only "at or about the polling place." The briefing and argument in this case take for granted that the second clause of the statute applies only at the polling place and does not extend to the 100 foot area outside the polling place regulated by the first clause of section 211B.11; this comports with the Court's reading of the statute. As such, the Court's analysis of the second clause applies to the polling place itself, not its surroundings. The *Burson* Court examined the polling place and the area within 100 feet of the polling place and concluded that the area was "a quintessential public forum." *Cf. id.* at 214 (Scalia, J., concurring) (expressing the view that the area outside of the polling place is a non-public forum subject only to the reasonableness test). *Burson* does not control what level of scrutiny applies to restrictions on speech that apply only "at or about" the

polling place. At oral argument, the parties agreed that the polling place is a nonpublic forum and every federal circuit and district court that has addressed this issue has concluded the same. *See, e.g.*, *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 749-50 (6th Cir. 2004); *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716 (D.C. Cir. 2001); *Am. Fed. of State, Cnty. and Mun. Emps., Council 25 v. Land*, 583 F. Supp. 2d 840, 848-49 (E.D. Mich. 2008); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364-65 (S.D.N.Y. 2007).[7] Section 211B.11's restrictions on speech "at or about the polling place" need only be viewpoint neutral and reasonable in light of the purpose served by the forum. *Cornelius*, 473 U.S. at 806 ("The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation.").

Section 211B.11, on its face, is viewpoint neutral. It applies to any political badge or button, no matter what view it espouses. *See id.* at 811-12 ("[A] decision to exclude all advocacy groups, regardless of political or philosophical orientation, is by definition viewpoint neutral."). Section 211B.11 is also reasonably related to the legitimate state interest of "maintain[ing] peace, order, and decorum," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), at polling places. *See Marlin*, 236 F.3d at 719-20 ("Because the Board's

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[7] At oral argument, Plaintiff's counsel argued that any content-based restrictions on speech must meet "exacting scrutiny" regardless of the forum, citing *Burson*. *Burson* does not stand for this proposition. As explained above, *Burson* applied strict scrutiny to an area defined as a *public* forum.

enforcement of [regulations barring political paraphernalia] to regulate political activity inside polling places is 'reasonable in light of the purpose for which the forum at issue serves,' given the history and function of polling places, we hold that the regulations do not violate the First Amendment." (citations omitted)); *cf. Burdick v. Takushi*, 504 U.S. 428, 438 (1992) ("[T]he function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrel[s]." (citations and quotation marks omitted)); *Berner v. Delahanty*, 129 F.3d 20, 26-27 (1st Cir. 1997) (upholding ban on "political-advocacy buttons" in Maine superior court because the "courthouse is a place in which rational reflection and disinterested judgment will not be disrupted").

2. As-Applied Challenge

Plaintiffs next challenge section 211B.11 as it is applied by Defendants' Election Day Policy. Plaintiffs challenge the policy on the basis that it is not viewpoint neutral and that it is not narrowly tailored to achieve a compelling state interest. The Court has already explained that the Election Day Policy need not be narrowly tailored to achieve a compelling state interest because it restricts speech only in the polling place, a nonpublic forum. Plaintiffs argue that the Election Day Policy is not viewpoint neutral because it singles out their political paraphernalia and organizations. The Election Day Policy lists the "Please I.D. Me" buttons as an example of material "specifically" "include[ed]" in the category of "issue oriented material." The Tea Party is listed

alongside Moveon.org as an example of a group with "recognizable political views" whose promotional materials are not allowed. The inclusion of illustrative examples does not alter the viewpoint neutrality of the policy. The Election Day Policy applies to badges, buttons, and insignia expressing all manner of political views. The fact that the Election Day Policy was promulgated following Plaintiff Susan Jeffers asking about "rumors" she had heard about the buttons and T-shirts does not support a finding that the Election Day Policy is not viewpoint neutral. *See Hill v. Colorado*, 530 U.S. 703, 724-25 (2000) ("[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of partisans on one side of a debate is without support."). Neither is it determinative that the restrictions are content-based. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983); *see also Families Achieving Independence and Respect v. Neb. Dep't of Soc. Servs.* (*FAIR*), 111 F.3d 1408, 1422 (8th Cir. 1997) (distinguishing based on message content is not viewpoint discrimination).

Because the polling place is a nonpublic forum, the Election Day Policy need only be reasonably related to the state's legitimate interests. The state has a well-established, legitimate interest in providing a safe, orderly, advocacy-free polling place.

See Mills, 384 U.S. at 218; *accord Burson*, 504 U.S. at 211 (describing the history and importance of ballot secrecy and noting that all 50 states limit access to the areas in and around the polling place). The Election Day Policy, like the statute, covers all political badges, buttons, or insignia. Plaintiffs' argument that the buttons and T-shirts in question are not political is unavailing. In fact, as the Court considers this case, there is a proposed legislation that would require voter identification pending in the Minnesota House of Representatives.[8] The Amended Complaint states that the "Please I.D. Me" buttons were created by EIW, a "grass roots effort to protect election integrity," "in preparation for the November 2010 Election." EIW "disseminated its buttons and instructed its separate organizational members and supporters" to wear the buttons in their polling places on election day. The language on the button intimates that government-issued identification should be—or is—required in order to vote in Minnesota. This intimation could confuse voters and election officials and cause voters to refrain from voting because of increased delays or the misapprehension that identification is required. On this basis alone, the Court concludes that it was reasonable to ban the "Please I.D. Me" buttons. *Cf.*

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[8] *See* H. Research, Minn. H.R., 87th Sess., Bill Summary of H.F. No. 89, third engrossment, (Apr. 19, 2011); H. Research, Minn. H.R., 87th Sess., Bill Summary of H.F. No. 210, third engrossment, (Apr. 14, 2011). The Court considers this proposed legislation to be a part of the public record. *See Friends of Lake View Sch. Dist. Inc. No. 25 of Phillips Cnty. v. Beebe*, 578 F.3d 753, 762 n.12 (8th Cir. 2009); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (taking judicial notice of publically available voting-age population statistics taken from Virginia Division of Legislative Services website on a motion to dismiss pursuant to 12(b)(6)).

Minn. Stat. § 204C.035, subd. 1 (2010) (providing criminal penalty for knowingly deceiving another individual regarding time, place, or manner of conducting an election, or the qualifications of voter eligibility for an election with the intent to prevent the individual from voting); *Burson*, 504 U.S. at 199 ("[A] State has a compelling interest in protecting voters from confusion and undue influence." (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 228-229 (1989))); *Berner*, 129 F.3d at 27 ("[The] mere wearing of a pin that advocates a position regarding a hotly contested political issue raises the specter of politicization and partiality."). In an organized effort such as this one, the buttons also identify a group of like-minded individuals, announcing their views and presence to others, increasing the potential for polarization, disruption, and intimidation at the polls.

Likewise, the Tea Party apparel communicates support for the Tea Party movement which is associated with particular views on matters of public governance. The Amended Complaint describes the North Star Tea Party Patriots as "a coalition of local associations in Minnesota with a mission to attract, educate, organize, and mobilize citizens to secure public policies consistent with values inclusive of fiscal responsibility, constitutionally limited government and free markets." (Am. Compl. ¶ 9) The Amended Complaint acknowledges that the Tea Party apparel at issue "reflect[s] the[se] values." (Am Compl. ¶ 45) In July 2010 the U.S. House of Representatives recognized a Tea Party caucus consisting entirely of Republican members of Congress. Mobilizing public opinion on matters of fiscal or electoral policy, or on the proper reach of government, like persuading and

organizing elected representation, is "political" activity by any fair estimation. Whether a group endorses candidates for public office is not the litmus test for whether it is a "political" organization. Such a pinched definition of politics would be inconsistent with the fundamental premise of American democracy: the power to govern, on any number of matters that come to be of general concern, belongs to the people. The vigorous debate about those matters is political, whether or not it finds expression in a registered political party as defined by the Minnesota Statutes. *See* Minn. Stat. § 200.02, subd. 6 (2010). The Court concludes that prohibiting apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of "maintain[ing] peace, order, and decorum" at the polls. *Mills*, 384 U.S. at 218; *accord Burson*, 504 U.S. at 211 ("The Court . . . has recognized that a State indisputably has a compelling interest in preserving the integrity of its election process." (quotation marks omitted)); *see also* Minn. Stat. § 204C.08, subd. 1d (2010) (voters in Minnesota "have the right to vote without anyone in the polling place trying to influence [their] vote"). Given the statements made by the apparel and buttons, and the singular purpose of the polling place, it is inconsequential that the institutional Plaintiffs are not political parties, that the institutional Plaintiffs do not endorse political candidates, and that there was no ballot measure on voter identification on the November 2, 2010, ballot. The Court finds section 211B.11 constitutional as applied.

3. Vagueness Challenges

Plaintiffs challenge the constitutionality of section 211B.11 and the Election Day Policy based on vagueness. It is not entirely clear whether the parties believe that the issue of vagueness is the subject of the Amended Complaint. Defendant Ritchie devotes one paragraph and cites one case dealing with the issue in his reply to Plaintiffs' memorandum, as do the Hennepin County Defendants. The Ramsey County Defendants make no mention of the vagueness doctrine in either of their submissions to the Court. Plaintiffs' memorandum cites no cases on this point, though they do make a strenuous argument based on the lack of standards in the Election Day Policy and the statute's lack of a definition for the word political. Given this general lack of briefing, the most reasonable conclusion is that the Amended Complaint does not allege that Minnesota Statutes section 211B.11 is void for vagueness. Nevertheless, a vagueness challenge would not alter the Court's conclusion with respect to Defendants' motions for dismissal.

"The void-for-vagueness doctrine is embodied in the due process clauses of the fifth and fourteenth amendments." *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 438 (8th Cir. 1998). A vague regulation violates the Constitution if it fails (1) to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) to establish standards to permit enforcement of the law in a non-arbitrary, non-discriminatory manner. *Id.* "In a facial vagueness challenge, an enactment reaching a substantial amount of constitutionally

protected conduct may withstand constitutional scrutiny only if it incorporates a high level of definiteness. An enactment imposing criminal sanctions or implicating constitutionally protected rights demands more definiteness than one which regulates the economic behavior of businesses." *Id.* In the First Amendment context, there is the added concern that a vague statute will create a chilling effect because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Unless a statute's vagueness poses a real and substantial threat to protected expression, it will not be struck down as vague. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59-60 (1976). In assessing vagueness, "we are relegated . . . to the words of the ordinance itself, to the interpretations the court below has given to analogous statutes, and perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." *Grayned*, 408 U.S. at 110.

a. Vagueness of Statute

Count IV alleges that "the word 'political' as seen in the context of the facts of this case is facially constitutionally invalid." (Am. Compl. ¶ 129) Plaintiffs conflate the concept of an as-applied challenge with a facial challenge; a facial attack on a statute does not depend on the application of a specific set of facts to the language of the statute. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992). Nevertheless, the Court reads the complaint

liberally and interprets this as a facial vagueness challenge to the statute.[9]

When examining whether a statute provides constitutionally sufficient notice, the relevant inquiry is whether the language "provides fair warning of the conduct that is prohibited" to a "person of ordinary intelligence." *Venkelese v. City of Fargo*, 248 F.3d 738, 747 (8th Cir. 2001); *CSC v. Letter Carriers*, 413 U.S. 548, 578-79 (1973). Section 211B.11 does not include a definition of political. Defendants argue that the definition of political is plain and unambiguous, even without an explicit statutory definition. *See Merriam-Webster's Collegiate Dictionary* 899 (10th ed. 2001) (defining "political" as "of or relating to government, or the conduct of government" and "of, relating to, involving, or involved in politics and esp. party politics"). In response, Plaintiffs cite several dictionary definitions of the word "political" and assert that the term is ambiguous. (Pls.' Mem. Resp. at 15 ("[O]f or concerning government, or political affairs generally"; "of, pertaining to, or concerned with politics . . . of, pertaining to, or connected with a

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[9] Although not raised by either party, the Court is not without doubt as to whether Plaintiffs can mount a facial vagueness challenge when their conduct appears to have been clearly proscribed by the statute. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) ("[E]ven to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice."). Perhaps Plaintiffs' failure to seriously brief this issue, especially as to notice, is an acknowledgment that they do not have standing to bring a facial challenge based on vagueness. However, because the issue has not been raised or briefed, the Court will address the merits of the claim.

political party"; "pertaining to politics; of or relating to the conduct of government")). These definitions, which are substantially similar, comport with the common understanding of the word political. The Court finds that the word "political" is not vague. *Cf. McConnell v. FEC*, 540 U.S. 93, 241 (2003) (phrase "political matter of national importance" not unconstitutionally vague), overruled on other grounds by *Citizens United*, 130 S. Ct. 876; *Bryant v. Gates*, 532 F.3d 888, 893 (D.C. Cir. 2008) (rejecting vagueness challenge to ban on "political" advertisements); *see also FAIR*, 111 F.3d at 1415-16 (rejecting vagueness challenge to unwritten ban on "advocacy groups," defined to include "'political' groups," in nonpublic forum); *State v. Schirmer*, 646 So. 2d 890, 902 (La. 1995) (reading *Burson* to approve a "comprehensive restriction" "upon all political speech" within 100 feet of polling places).[10] That the word "political" can be applied in various circumstances, some of which necessarily depend upon what issues are currently "involved in politics" or being discussed in relation to issues of governance, does not make its meaning unclear. Further, that the statute regulates the polling place—

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[10] That the Minnesota Supreme Court has construed "political committee" and "political fund" narrowly to avoid vagueness and overbreadth concerns in the context of campaign finance disclosure requirements, *see Minn. Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424 (Minn. 2005), does not control the Court's analysis. *Kelley* focused on a statute modeled directly on one previously interpreted by the United States Supreme Court as requiring a narrowing construction to avoid vagueness in *Buckley v. Valeo*, 424 U.S. 1, 77-80 (1976) (narrowly construing requirement that "political committees" and all others making expenditures "to influence the nomination or election of a candidate"). Both *Buckley* and *Kelley* are inapposite because campaign finance involves a public, not a nonpublic, forum.

historically a place of neutrality meant to provide a space "as free from interference as possible"—further supports a finding that the ban on "political" material is easily understood to include issues beyond those directly applicable to the ballot. *Burson*, 504 U.S. at 211; *see also Boos v. Barry*, 485 U.S. 312, 332 (1988) (interpreting undefined terms in statute based on given context for which statute is crafted); *Grayned*, 408 U.S. at 108 (same).

That the statute provides discretion to individual election judges is not by itself constitutionally fatal. *See Ridley v. Mass. Bay Trans. Auth.*, 390 F.3d 65, 93 (1st Cir. 2004) ("The mere fact that a regulation requires interpretation does not make it vague." (citations omitted)). Election judges will surely have to use discretion to determine whether a given expression is political, but "enforcement of all laws involves some discretion." *Venkelese*, 248 F.3d at 747 (citation omitted). Further, "[e]xcessive discretion and vagueness inquiries under the First Amendment are not static inquiries, impervious to context." *Ridley*, 390 F.3d at 94-95 (citations omitted). "[A] grant of discretion to exercise judgment in a non-public forum must be upheld so long as it is 'reasonable in light of the characteristic nature and function' of that forum." *Id.* at 95; *see also Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323-24 (Fed. Cir. 2002) (concluding that greater latitude ought to be afforded to officials in nonpublic fora because "'selectivity' and 'discretionary access' are defining characteristics of non-public fora, which unlike public fora are not intended to be open to all such speech"). Indeed, if election officials had not caught wind of the organized effort here, election

judge discretion would have been the last bulwark between the "Please I.D. Me" buttons and the polling place. The Court concludes that the discretion inherent in the statute is reasonable to ensure that Minnesota is able to maintain a neutral zone where voters will not be disturbed by ad hoc, of-the-moment campaigns or other movements at the polls which might disrupt or inappropriately influence voters but which may not be foreseen by the legislature.

Moreover, because the polling place is a nonpublic forum created for the limited purpose of exercising voting rights, the risk that constitutionally protected speech there will be chilled is small. "The only expressive activity involved [in the polling place] is each voter's communication of his own elective choice and this has long been carried out privately—by secret ballot in a restricted space." *Marlin*, 236 F.3d at 719 ("[T]he interior of a polling place . . . is not available for general public discourse of any sort."); *see Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001) ("The touchstone of a facial vagueness challenge in the First Amendment context . . . is not whether some amount of legitimate speech will be chilled; it is whether a substantial amount of legitimate speech will be chilled."); *accord Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989); *cf. Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (finding no First or Fourteenth Amendment violations where city prohibits "political or public issue advertising" on city public rapid transit system because "[n]o First Amendment forum is here to be found").

b. Vagueness and Standardless Discretion in the Election Day Policy

Plaintiffs also appear to claim that the Election Day Policy is vague. (Am. Compl. ¶ 131) In their brief, Plaintiffs challenge the word "political," and the phrases "recognizable political views" and "issue oriented material designed to influence or impact voting." The Election Day Policy identifies five specific categories of materials as "political." The Policy refers to the Tea Party and Moveon.org as examples of organizations with "recognizable political views." "Please I.D. Me" buttons were also specifically referred to in the Election Day Policy. These examples serve to further clarify—not confuse—the meaning of the word political for individuals reading the policy. Indeed, "[t]o the extent these terms are unclear when read in isolation, they find clarity when read in context with the entire [policy]—the [policy] provides clear limiting examples illustrating the meaning of these terms." *Hunt*, 2011 WL 982475, at *8 (examining context to clarify terms "inherently communicative" and "nominal utility apart from its communication"); *see Griffin*, 288 F.3d at 1330 ("Challenged terms must be read in context of the regulation as a whole."). Persons of ordinary intelligence can conclude that if they wear apparel that can reasonably be understood to express a political statement they may be asked to cover or remove the item while at the polls. Thus, the Election Day Policy provides fair warning of the types of badges, buttons, and insignia that are prohibited while voting.

The Plaintiffs argue the Election Day Policy allowed "arbitrary and standardless" enforcement. This issue arises both as part of Plaintiffs' vagueness challenge and in their separate due process claim that the Election Day Policy "exercises a standardless discretion." The Court addresses these claims together because, though "[t]he void-for-vagueness doctrine and the excessive delegation doctrine are technically 'analytically distinct,'" the two claims overlap here. *See Ridley*, 390 F.3d at 94; *see also Bryant*, 532 F.3d at 894 n.1. Plaintiffs cite cases that stand for the proposition that licensing systems "which vest in an administrative official discretion to grant or withhold a permit based upon broad criteria unrelated to proper regulation of public places" are consistently condemned. *Shuttlesworth v. Alabama*, 394 U.S. 147, 153 (1969). Section 211B.11 is not a licensing system allowing the regulation of speech in a public forum. *See Ridley*, 390 F.3d at 94-95 (distinguishing cases that "deal with licensing schemes regulating the exercise of speech in traditional public fora" from a regulatory scheme that is not a licensing scheme and "is neither a traditional nor designated public forum" (citation omitted)); *see also Griffin*, 288 F.3d 1321 ("All of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside of a public forum."). "[W]hile the fact that the government may constitutionally impose content-based restrictions on speech in nonpublic fora does not insulate a regulation from an unbridled discretion challenge," a restriction within the polling place does not pose the same threats to expression as a licensing scheme in a public forum. *See Griffin*, 288 F.3d at

1322-24 (upholding restriction on expression on Department of Veterans Affairs property and distinguishing it from licensing schemes that restrict newspapers or other media in the public forum (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988))). As such, the licensing cases cited by Plaintiffs are not especially germane to Plaintiffs' challenge to the policy. Given the purpose and history of the polling place, it is reasonable that election judges be given discretion to determine what is political. There exists the potential for innumerable issues to become political, though they may not ordinarily be considered so, because of an on-going national debate, local controversy, or relevance to an issue or candidate on the ballot.[11] *See Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1314 (Fed. Cir. 2008) (rejecting First Amendment unbridled discretion challenge to ban on "demonstrations" at VA Medical Centers in light of need "to maintain a place of healing and rehabilitation for veterans"); *Griffin*, 288 F.3d at 1324-25 (finding discretion reasonable to

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[11] To the extent Plaintiffs have argued that the Election Day Policy is an unconstitutional prior restraint, the Court finds that the statute is "not a prior restraint, but a restriction on otherwise protected speech: 'A frequent pitfall of both courts and commentators is to employ the doctrine [of prior restraint] in cases involving expression clearly within the first amendment guarantees, in ignorance of the fact that [w]here the speech in question is in all events guaranteed by the First Amendment, attributing that guarantee to the circumstance of prior restraint is at best irrelevant and often misleading.'" *Van Bergen v. Minnesota*, 59 F.3d 1541, 1551 n.6 (8th Cir. 1995) (quoting Lawrence H. Tribe, *American Constitutional Law* 1041 (1988)). Further, Plaintiffs are not prevented from expressing their message; they are prohibited from expressing it within the narrow area of the polling place. *Cf. Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 n.2 (1994).

ensure the preservation of the commemorative functions of national cemeteries even where such decisions "may defy objective description and . . . vary with individual circumstances"). Further, while it is unconstitutional to enable a public official to determine which viewpoints will be permitted and which will not, *see Lewis v. Wilson*, 253 F.3d 1077, 1079-80 (8th Cir. 2001), the Election Day Policy does not allow expression of any political viewpoints. This is not a case where regulations require a speaker to receive permission to engage in speech or which permits communication in a certain manner for some but not for others; all political expressions, regardless of the view, are prohibited in the polling place.

4. Overbreadth of the Policy

The Court now turns to Plaintiffs' claim that the Election Day Policy is overbroad. Plaintiffs' overbreadth claim is based on their belief that the word "political" is "so broad it is overinclusive." (Pls.' Mem. Resp. at 14) To be unconstitutional, overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Venkelese*, 248 F.3d at 747 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Where, as here, a plaintiff's overbreadth claim is based on the same factual allegations as those underpinning their as-applied challenge to a statute, review for overbreadth is inappropriate. *See, e.g., United States v. Kistner*, 68 F.3d 218, 220 n.5 (8th Cir. 1995) (citing *Van Bergen*, 59 F.3d at 1549-50) (no review for overbreadth where no significant difference between plaintiff's claim that the policy statement is unconstitutional as applied to

his particular activities and his claim that the policy statement is invalid for overbreadth).

Even if review for overbreadth were appropriate, the Election Day Policy is not overbroad. "A successful overbreadth claim must show that a challenged statute will 'compromise recognized First Amendment protections of parties not before the Court' who engage in 'conduct more likely to be protected by the First Amendment than [plaintiff's] own [conduct].'" *Ways v. City of Lincoln*, 274 F.3d 514, 518 (8th Cir. 2001) (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 801, 802 (1984)). Plaintiffs here specifically object that the Election Day Policy "restrict[s] a person from wearing an ideological statement in the polling place when the statement does not endorse a candidate or ballot question," and, in so doing, covers too broad a swath of expression. (Pls.' Mem. Resp. 17) As previously explained, such an ideological statement, if it is political as understood by the common sense definition of the word, is reasonably prohibited from the polling place. The impact of the Election Day Policy on the conduct of other speakers will not differ from its impact on the Plaintiffs. Like the individual Plaintiffs, other individuals wearing clothing or buttons expressing political ideology or beliefs, even those unrelated to a candidate or ballot question, will fall within the policy's legitimate sweep. *See Hill*, 530 U.S. at 731 (reasoning that comprehensiveness of statute was virtue rather than vice); *see also Marlin*, 236 F.3d at 720 ("That narrower regulations might be as effective or more so . . . does not invalidate the means the District has chosen."). Because of the special interests at stake in the polling place—a nonpublic forum—this case is distinct from

others that have analyzed similar language for overbreadth in public fora. *Cf. Anderson v. Spear*, 356 F.3d 651, 663-65 (6th Cir. 2004) (finding prohibition on "electioneering," defined to include speech instructing voters on how to cast absentee ballots and speech "remind[ing] voters to fill in the ovals completely," within 600-feet of polling place is overbroad); *Bauers v. Cornett*, 856 F.2d 1517, 1525-26 (8th Cir. 1989) (narrowly construing state law prohibiting state employees from soliciting financial assistance "for any political party, candidate, political fund, or publication, or any other political purposes").

5. Deprivation of Voting Rights

Plaintiffs allege that Cilek was deprived of the right to vote the first time he went to his polling place. Defendants counter that Plaintiffs have pleaded no facts connecting the individual Defendants with the violation of individual rights and so they cannot be liable for Cilek's alleged voting rights deprivation. "[A] municipality cannot be held liable solely for the acts of others, e.g., solely because it employs a tortfeasor" "[b]ut the municipality may be held liable when execution of a government's policy or custom . . . inflicts the injury." *Los Angeles Cnty. v. Humphries*, 131 S. Ct. 447, 452 (2010); *Parrish v. Ball*, 594 F.3d 993, 997 (8th Cir. 2010) (plaintiffs must plead facts that plausibly show that Defendants or the "county 'itself caused the constitutional violation at issue'"). "To establish personal liability of the supervisory defendants, [plaintiff] must allege specific facts of personal involvement in, or direct responsibility for, a deprivation of his constitutional rights." *Mayorga v. Missouri*, 442 F.3d 1128, 1132 (8th Cir. 2006). Because

the Plaintiffs have not pleaded any facts connecting Defendants with the alleged actions against Cilek, and because the Election Day Policy mandates that all individuals be allowed to vote regardless of their compliance with the policy, Plaintiffs have failed to plead that these Defendants unconstitutionally hindered Cilek's right to vote.

6. Failure to Train

Plaintiffs also allege that Defendants did not adequately educate, train, and instruct election judges and poll workers in a manner to avoid "intentional, reckless, or callous indifference" to Plaintiffs' free speech, association, and voting rights. Defendants, in turn, argue that this claim is inadequately pleaded. Government officials are liable in their official capacity under 42 U.S.C. § 1983 for failure to adequately train their employees where training practices are inadequate; the government entity was deliberately indifferent to the rights of others in adopting the training practices; and an alleged deficiency in the training procedures actually caused the plaintiff's injuries. *Parrish*, 594 F.2d at 997. Accordingly, for the Defendants to be liable for failure to train and supervise, Defendants' alleged failure to train must have caused a deprivation of constitutional rights. *Tlamka v. Serrell*, 244 F.3d 628, 635 (8th Cir. 2001) (citing *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996)). Consistent with the Court's determination that Plaintiffs have not pleaded any violations of their rights to free speech or association, the Court finds Plaintiffs have not pleaded a failure to train claim based on those alleged violations.

As for the right to vote, the Election Day Policy and the Amended Complaint make clear that Mansky specifically instructed election judges that "no person should be turned away from voting even if that person failed to cover up his or her 'political shirt, hat, button, badge, or insignia' particularly those wearing 'Please I.D. Me' buttons or Tea Party Patriots clothing." (Am. Compl. ¶ 59) Given this policy, there is no set of facts which could plausibly show that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that [Defendants] can reasonably be said to have been deliberately indifferent to the need." *Ambrose v. Young*, 474 F.3d 1070, 1079-80 (8th Cir. 2007) (quotation omitted). Plaintiffs have not pleaded facts that plausibly show improper training by Defendants related to their right to vote.

B. Count II: Due Process Claims

Plaintiffs' due process claim focuses specifically on Defendants' implementation of the Election Day Policy.[12] Pleading a substantive due process violation requires alleging actions that violate one or more fundamental constitutional right and were shocking to the "contemporary conscience." *C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347*, 591 F.3d 624 (8th Cir. 2010). Defendants assert that Plaintiffs' due process claims should be dismissed because they

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[12] The parties agree that Plaintiffs' Minnesota due process claim should be treated identically to their federal claim "because the due process protection provided under the Minnesota Constitution is identical to that which is provided by the federal constitution." *Sartori v. Harnschfeger Corp.*, 432 N.W.2d 442, 453 (Minn. 1988).

"overlap fully" with their First Amendment claims and are thus subsumed by those claims. *See Koutnik v. Brown*, 456 F.3d 777, 781 n.2 (7th Cir. 2006); *Edwards v. City of Goldsboro*, 178 F.3d 231, 248 n.11 (4th Cir. 1999); *see generally Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."). A review of the Amended Complaint reveals that Plaintiffs' due process claims, with the exception of the one allegation related to voting rights, overlap fully with their First Amendment claims. Plaintiffs do not dispute this and the Court proceeds accordingly.

Plaintiffs allege that the Election Day Policy violated their due process rights by interfering with their right to vote. The only facts in the Amended Complaint that support such an allegation are those regarding Cilek's alleged voting deprivation and, potentially, the unidentified voter who was "interrupted" while voting. The right to vote is a fundamental right and thus, if a policy infringes on the right it must meet strict scrutiny. *See, e.g., Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969). The Election Day Policy requires that all individuals be allowed to vote, whether or not they are compliant with a request to remove political material—the Election Day Policy does not infringe on the right to vote and is thus not subject to strict scrutiny. Insofar as this claim is based on the enforcement of the Election Day Policy, the Court has explained that the policy-level Defendants against whom this action is

brought cannot be held liable for violations of constitutional rights unless their actions, or the government's policy or custom, were the moving force behind the violation. Count II is dismissed.

C. Count III: Equal Protection Claim

Plaintiffs plead (1) that Defendants adopted a policy to intentionally discriminate against the Plaintiffs; and (2) that the standardless discretion allowed by the policy resulted in inconsistent enforcement. Defendants argue that Plaintiffs' state and federal equal protection claims must fail because they have not shown that the Election Day Policy treated them differently than similarly situated people. Under both Minnesota and federal law, the government is required to treat similarly situated people the same. *See Ganley v. Minneapolis Park & Recreation Bd.*, 491 F.3d 743, 747 (8th Cir. 2007); *Beaulieu v. Mack*, 788 N.W.2d 892, 898 (Minn. 2010).

Plaintiffs argue that they have made a "class of one" equal protection claim. The purpose of a class-of-one equal protection claim is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Plaintiffs may prevail on a class-of-one claim by showing that they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Even assuming that the individual and institutional Plaintiffs were treated differently because of their association with one of the Plaintiff organizations, Plaintiffs have not alleged facts that plausibly support a finding that enforcement of the Election Day Policy discriminated against Plaintiffs or caused Plaintiffs' injuries. As explained above, the Election Day Policy is viewpoint neutral. The Election Day Policy treats similar individuals and groups similarly; the only difference with respect to the institutional Plaintiffs and other political organizations (such as Common Cause or the Sierra Club) is that the Tea Party and the "Please I.D. Me" buttons are mentioned explicitly by name. Moveon.org is also mentioned by name in the policy, as are most of the major political parties. Moreover, Plaintiffs have acknowledged that the coalition EIW was formed "in preparation for the 2010 election" as a "grass roots effort to protect election integrity." After its formation, EIW created and disseminated the "Please I.D. Me" buttons to its members to wear on election day and, subsequently, Plaintiff Sue Jeffers approached Ramsey County Elections Manager Joe Mansky about the buttons. It was reasonable for Defendants to respond to this organized effort by educating election judges and issuing the Election Day Policy. *Id.*; *Costello v. Mitchell Pub. Sch. Dist.* 79, 266 F.3d 916, 921 (8th Cir. 2001); *cf. United States v. Catlett*, 584 F.2d 864, 867 (8th Cir. 1978) ("While the decision to prosecute an individual cannot be made in retaliation for his exercise of his first amendment right to protest government war and tax policies, the prosecution of those protestors who publicly and with attendant publicity assert an alleged personal privilege not to pay taxes as part of their protest is not selection on an

impermissible basis."). Having been informed of an organized movement that had the potential to disrupt polling places, election officials were under no requirement to sit on their hands and refrain from giving guidance to workers at the polls.

The alleged inconsistent enforcement of the Election Day Policy—allowing some individuals to vote wearing Common Cause or the Sierra Club buttons but asking some of the individual Plaintiffs to cover their Tea Party Patriot T-shirts or EIW buttons—does not state an equal protection claim against the Defendants who wrote and promulgated the policy. For the same reasons that Defendants are not liable for Cilek's alleged voting rights deprivation, they are not liable for any inconsistent enforcement of the Election Day Policy. Plaintiffs have not adequately alleged an equal protection violation against Defendants.

In their response, Plaintiffs argue that they have alleged that Defendants failed to adequately train election judges and poll workers. The Amended Complaint states, under Count I, that election judges and poll workers were not properly educated "in a manner to avoid the threatened intentional, reckless, or callous indifference to the Plaintiffs' federally protected rights of freedom of speech and association, and the right to vote." The Amended Complaint does not state that the failure to train caused intentional discrimination by poll workers such that their equal protection rights were violated. Plaintiffs have failed to allege that the deprivation of their equal protection rights was caused by a failure to train. *See Parrish*,

594 F.3d at 997 (stating elements for failure to train claim).

D. Secretary of State Mark Ritchie's Claim of Sovereign Immunity

Defendant Secretary of State Mark Ritchie also claims the complaint must be dismissed as against him because he is immune from suit under the Eleventh Amendment. Because the Court finds the Plaintiffs have failed to state a claim on which relief can be granted, the Court does not reach Ritchie's claim of sovereign immunity. *See Beebe*, 578 F.3d at 763 n.14.

III. CONCLUSION

The Court concludes that section 211B.11 and the Election Day Policy are constitutional. The "right to vote freely for the candidate of one's choice is the essence of a democratic society," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), and Minnesota's strong interest in creating a neutral zone where individuals can vote free from external influence is reasonably furthered by restricting the expression of political views within the narrow confines of the polling place. Plaintiffs have failed to state a claim on which relief can be granted based on the constitutional infirmity of section 211B.11, the Election Day Policy, or on any of the alleged actions taken by these Defendants.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. The Defendants' motions to dismiss [Docket Nos. 43, 48, 51] are GRANTED.

2. This action is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 29, 2011

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

Appendix F-1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 11-2125

Minnesota Majority, et al.

Appellants

v.

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County, et al.

Appellees

Appeal from U.S. District Court for the
District of Minnesota - Minneapolis
(0:10-cv-04401-JNE)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judge Smith and Judge Shepherd would grant the petition for rehearing *en banc*.

May 07, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix G-1

TEA PARTY PATRIOTS

Tea Party T-Shirts, Apparel & Hats

Men's Red Remember in November T-Shirt

Men's Red Gadsden T-Shirt

Men's Navy Polo Shirt

Liberty

Men's White Liberty T-Shirt

Kid's White Logo T-Shirt

Men's Blue Logo T-Shirt

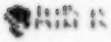
Men's Red Logo T-Shirt

Men's White Logo T-Shirt

Men's Black Shield T-Shirt

Appendix H-2

Men's Red Principles T-Shirt



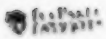
Men's White Long Sleeve Logo T-Shirt

Women's White Logo T-Shirt

Women's Black Shield T-Shirt

Men's White 912 Event T-Shirt

Men's Red 912 Event T-Shirt



Women's White Visor

Red Logo Hat

Black Shield Hat

Ramsey County Elections
90 West Plato Boulevard,
Suite 160
P.O. Box 64098
St Paul, MN 55164-0098
Email: elections@co.ramsey.mn.us

Phone: 651.266.2171
Fax: 651.266.2177

October 30, 2010

TO: Ramsey County Head Election Judges

FROM: Joseph Mansky
Ramsey County Elections Manager

SUBJECT: DISPLAYING CAMPAIGN MATERIALS IN THE POLLING PLACE

Please use the following process when dealing with an individual who is displaying political or campaign material in the polling place.

1. Minnesota law prohibits persons from wearing "political badges, political buttons, or other political insignia" or displaying campaign material within the polling place.

2. Election judges have the authority to decide what is "political." Examples include, but are not limited to:

   - Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.

- Any item including the name of a candidate at any election.

- Any item in support of or opposition to a ballot question at any election.

- Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).

- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

3. If a person is wearing political material, you should do the following:

   - Explain that the state election law prohibits displaying political materials in the polling place. (Minnesota Statutes 211B.11, subdivision 1.)

   - Ask the individual to either cover up or remove the political material while in the polling place.

   - If they refuse, explain that eligible voters will be allowed to vote, but any refusal will be recorded and referred to appropriate authorities.

4. Even if a voter refuses to do so, you must permit any eligible voter to receive a ballot and vote.

5. Record the name and address of a voter from the polling place roster in the daily journal, along with a brief description of the item (button, hat, t-shirt, etc.) that the voter refused to remove or cover up.

6. Election judges and official challengers are prohibited from displaying political or campaign material in the polling place. If they refuse to remove the political or campaign material, you can ask them to leave.

If you have any questions about this matter, please contact the Elections office or your city clerk.

RECORD AND BRIEFS

No. 16-1435

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE,
ANDREW E. CILEK, AND SUSAN JEFFERS,

Petitioners,

vs.

JOE MANSKY, IN HIS OFFICIAL CAPACITY AS THE ELECTIONS MANAGER FOR RAMSEY COUNTY; VIRGINIA GELMS, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS THE ELECTIONS MANAGER FOR HENNEPIN COUNTY; MIKE FREEMAN, IN HIS OFFICIAL CAPACITY AS HENNEPIN COUNTY ATTORNEY; JOHN CHOI, IN HIS OFFICIAL CAPACITY AS RAMSEY COUNTY ATTORNEY; STEVE SIMON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 211B.11, subd. 1 of the Minnesota Statutes creates a protected zone within 100 feet of a polling place on Election Day and also prohibits individuals who enter the polling place from wearing "a political badge, political button, or other political insignia" while inside the polling place.

The question presented in the petition is whether Minnesota's law prohibiting individuals from wearing "a political badge, political button, or other insignia" within the polling place on Election Day is unconstitutional on its face because it violates the First Amendment to the United States Constitution.

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STATEMENT OF THE CASE

I. Introduction

The Court should deny the petition for certiorari. There are no compelling reasons for this Court to review the U.S. Court of Appeals for the Eighth Circuit's determination that petitioners' First Amendment facial challenge failed as a matter of law. Despite petitioners' claim that the court of appeals erred in its application of the overbreadth doctrine, the court of appeals' analysis is in accord with other circuit court decisions, does not conflict with any Supreme Court precedent, and does not present a significant issue that needs to be addressed by this Court. The court of appeals' legal conclusion that the interior of a polling place is a nonpublic forum in which speech restrictions are constitutional as long as they are reasonable and viewpoint neutral is the same conclusion reached by every court that has analyzed the issue and constitutes a logical and straightforward application of *Burson v. Freeman*, 504 U.S. 191 (1992). Petitioners' facial overbreadth challenge is not appropriate for review because the court of appeals' dismissal of this claim is in harmony with Supreme Court precedent and other circuit court decisions.

This Court need look no further to deny this petition than the fact that petitioners' as-applied challenge was summarily rejected by the court of appeals and review was not sought. Petitioners' as-applied challenge was centered on the same argument presented here – application of this statute to "political" non-campaign

material (petitioners' "political" non-campaign buttons and t-shirts) violates the First Amendment. Thus, petitioners' argument in the petition is predicated on this Court concluding that although the statute was constitutionally applied to petitioners, it is still overbroad as a matter of law because it could sweep too broadly. This Court should deny the petition because any overbreadth in that statute – which was constitutionally applied to petitioners – can be corrected in future as-applied challenges.

II. Parties

Petitioner Minnesota Voters Alliance is a group that purports to be concerned about the integrity of elections. Petition ("Pet.") 2. During the 2010 election, Petitioner Andrew E. Cilek was an eligible voter in Hennepin County, Minnesota, and Petitioner Susan Jeffers was an election judge in Ramsey County, Minnesota. Appendix ("App.") E-3, E-7.

In 2010, Minnesota Voters Alliance was part of a coalition known as Election Integrity Watch with two other organizations, Minnesota Majority and Minnesota North Star Tea Party Patriots.[1] App. E-3. Election Integrity Watch orchestrated a public campaign to affect behavior within the polling place on Election Day 2010 by creating and disseminating a "Please I.D. Me" button to be worn by voters inside the polling place,

---

[1] Election Integrity Watch, Minnesota Majority, and Minnesota North Star Tea Party Patriots were plaintiffs in the action below but are not currently petitioners.

even though Minnesota does not have a photo identification requirement to vote. App. C-12. The button stated "Please I.D. Me" in large letters and listed both a toll-free phone number and EIW's website address. App. G-1. The Minnesota North Star Tea Party Patriots (a part of the Election Integrity Watch coalition) also distributed t-shirts and other apparel from the national Tea Party Patriots organization with the Tea Party's logo and related political slogans, including "Don't tread on me," "Liberty," "We'll Remember in November," and "Fiscal Responsibility, Limited Government, Free Markets." App. H-1, H-2.

On the eve of Election Day 2010, petitioners (among other plaintiffs) sought a temporary restraining order ("TRO") against the Minnesota Secretary of State, the Hennepin County Attorney and Elections Manager (the "Hennepin County respondents"), and the Ramsey County Attorney and Elections Manager (the "Ramsey County respondents") (together "respondents") to enjoin enforcement of a portion of Section 211B.11, subdivision 1 ("Section 211B.11"), of Minnesota Statutes, so that voters could wear the "Please I.D. Me" buttons and Tea Party Patriots t-shirts in the polling place on Election Day. App. D-3. On November 1, 2010, after a hearing, the district court denied the TRO. *Id.* Despite that ruling, on Election Day 2010, Petitioner Cilek wore both a "Please I.D. Me" button and a Tea Party Patriots t-shirt to his polling place in Hennepin County, Minnesota. App. E-7.

III. Minnesota's Speech Limitations Within Polling Places.

Section 211B.11, subdivision 1, of the Minnesota Statutes prohibits displaying "campaign material," posting "signs" or soliciting voters within 100 feet of the polling place and prohibits people from wearing "a political badge, political button, or other political insignia . . . at or about the polling place." The statute is the current codification of a Minnesota law that dates back to 1893, designed to protect Minnesotans' right to vote in an orderly and controlled environment without confusion, interference, or distraction. *See* 1893 Minn. Laws, Ch. 4, § 108; 1912 Minn. Laws, Ex. Sess., Ch. 3, §§ 13, 14.

On the eve of Election Day 2010, after the district court denied petitioners' motion for a TRO, respondents issued identical policies on Section 211B.11 to all polling places, to clarify the limited scope of Section 211B.11 and to provide guidance on what items were prohibited from inside polling places (the "Election Day Policy"). App. E-6, I-1 to I-3. The Election Day Policy first identified examples of "political" material prohibited from polling places, including but not limited to:

- Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.
- Any item including the name of a candidate at any election.

- Any item in support of or opposition to a ballot question at any election.
- Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).
- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

App. I-1 to I-2.

The Election Day Policy then directed election judges to ask individuals to cover up or remove any political material while in the polling place. App. I-2. However, the Election Day Policy explicitly stated that "[e]ven if a voter refuses to [remove or cover political material], [election judges] must permit any eligible voter to receive a ballot and vote." *Id.*

IV. Petitioners' Lawsuit.

After the 2010 election, petitioners amended their complaint and respondents moved to dismiss the complaint as a matter of law. App. E-2. Petitioners' amended complaint contained four constitutional claims:

(1) a First Amendment challenge to Section 211B.11 as applied to petitioners through respondents' Election Day Policy (Count I);

(2) a due process claim (Count II);

(3) an equal protection claim (Count III); and

(4) a First Amendment challenge to Section 211B.11 on its face (Count IV).

App. E-8.

On April 29, 2011, the district court granted respondents' motions to dismiss the amended complaint in its entirety, concluding that petitioners failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. App. E-2. Petitioners appealed the dismissal of the First Amendment and equal protection claims. App. D-2. In an opinion dated March 6, 2013, the court of appeals affirmed in part and reversed in part. *Id.* The court affirmed the dismissal of petitioners' equal protection claim. App. D-15. With respect to the two First Amendment counts, the court reversed the district court's dismissal of petitioners' as-applied challenge and remanded this claim, App. D-12; it affirmed the dismissal of the facial challenge, App. D-10.

In analyzing petitioners' First Amendment claims, the court of appeals applied this Court's traditional First Amendment forum analysis and concluded that the inside of a polling place was a nonpublic forum and therefore Section 211B.11's limitations on speech were constitutional if they were viewpoint neutral and "'reasonable in light of the purpose which the forum at issue serves.'" App. D-8 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). The court of appeals reversed and remanded the as-applied challenge because it concluded that the district court considered matters outside the pleadings in

considering the application of Section 211B.11 to petitioners. App. D-12. The court of appeals was unanimous in its analysis and remand of this as-applied claim. App. D-12, D-15 (Shepherd, J., concurring in part and dissenting in part).

With respect to the facial challenge, the court of appeals noted that a law may be invalidated as overbroad only if "'a substantial number of its applications are unconstitutional, judged in relation to the statute's legitimate sweep.'" App. D-5 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010), quoting in turn *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The court also noted that the "'decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.'" *Id.* D-9 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985) (emphasis in original)).

The majority then concluded that Section 211B.11 has a "plainly legitimate sweep" when it prohibits speech about a political *campaign* (in contrast to *non-campaign* political speech) and stated:

> Even if Minnesota acted unreasonably in applying the statute to some material, the complaint does not allege that there were a "substantial number" of such unreasonable applications in relation to the statute's reasonable applications. *See Wash. State Grange*, 552 U.S. at 449 n.6. "[W]hatever overbreadth may exist should be cured through case-by-case

> analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). [Petitioners] ha[ve] failed to state a facial claim under the First Amendment against Minn. Stat. § 211B.11, subd. 1.

App. D-10.

Judge Shepherd agreed with the overbreadth standards employed by the majority in analyzing petitioners' facial challenge; however, in his dissent he expressed his belief that further factual development was required to determine how the restrictions in Section 211B.11 "are reasonable limits on free speech which rationally relate to the state's interest in maintaining order and preserving the integrity at the polling place[.]" App. D-18. He would have remanded this claim "to allow the record to be developed regarding [petitioners'] facial challenge." App. D-19.

Following the court of appeals' decision in 2013, petitioners filed their first petition for a writ of certiorari with this Court, in which they sought review only of their facial challenge to Section 211B.11. On December 16, 2013, this Court denied the petition. *See* 134 S. Ct. 824 (U.S. Dec. 16, 2013) (No. 13-185).

After this Court denied certiorari review, this case returned to the district court on the remand of petitioners' as-applied challenge. The district court granted summary judgment to respondents, concluding that Section 211B.11 and the Election Day Policy are constitutional as applied to both the "Please I.D.

Me" buttons and the Tea Party Patriots apparel. App. B-33, C-19. Based on the undisputed evidence regarding the membership and purpose of the Election Integrity Watch coalition, the district court found that Section 211B.11 was constitutional as applied to the "Please I.D. Me" buttons, which the court found were intended "to falsely intimate to voters in line at the polls that photo identification is required in order to vote in Minnesota" as part of "a campaign that aims to change state and local laws such that voters would be required to present photo identification at the polls." App. C-13 to C-14. Photo identification is not a requirement in Minnesota, but these buttons were part of an orchestrated effort to disrupt the polling place by asking voters to produce a Minnesota ID and confront poll workers, in order to get other voters in line to also produce IDs.

Based on the undisputed evidence regarding the Tea Party movement and the Tea Party apparel that petitioners sought to wear to the polls, the district court also found that Section 211B.11 was constitutional as applied to the Tea Party Patriots apparel. App. B-33. The district court observed that petitioners' "effort to deny the obviously political nature of the Tea Party . . . is as unconvincing now as it was when [petitioners] first made it at the outset of this case." App. B-30. To the contrary, the district court concluded that the "Tea Party apparel communicates support for the Tea Party movement which is associated with particular views on matters of public governance." *Id.* (quoting *Minnesota Majority v. Mansky*, 789 F. Supp. 2d 1112,

1123 (D. Minn. 2011)). As a result, the district court found that "prohibiting [the Tea Party] apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of 'maintain[ing] peace, order, and decorum' at the polls." App. B-31 (quoting *Minnesota Majority*, 789 F. Supp. 2d at 1123-24, quoting in turn *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

Recognizing the obvious constitutional application of Section 211B.11 to the "Please I.D. Me" buttons, Plaintiffs chose not to appeal this application to the court of appeals. App. B-9. Instead, petitioners appealed their as-applied claim only with respect to the Tea Party shirts, and the court of appeals affirmed the district court's ruling. App. A-7. Specifically, the court of appeals agreed with the district court's conclusion that "[e]ven if Tea Party apparel is not election-related, it is not unreasonable to prohibit it in a polling place" because "[i]n order to ensure a neutral, influence-free polling place, all political material is banned [by Section 211B.11]." App. A-6.

Petitioners now bring their second petition for a writ of certiorari. As with their 2013 petition, petitioners challenge only the dismissal of their facial challenge to Section 211B.11 under the First Amendment. Petitioners do not seek review of their as-applied challenge.

ARGUMENT

The Court should deny the petition because the court of appeals' decision – that Section 211B.11 is not overbroad but a reasonable and viewpoint-neutral regulation of speech in the nonpublic forum of a polling place – is in accord with the precedent of this Court, including *Burson*, 504 U.S. 191, as well as the decisions of the other circuit courts that have considered speech restrictions within the polling place. Neither the court of appeals' application of the forum analysis to a restriction of political speech within a polling place nor its overbreadth analysis raise any compelling legal issues requiring this Court's review.

I. The Petition Should Not Be Granted Because This Case Does Not Involve a "Speech-Free Zone," Nor Does It Involve a Statute with Substantial Overbreadth.

Petitioners assert this case is an appropriate vehicle for the Court to examine whether a "speech-free zone" comports with the First Amendment. Pet. 24. However, this case does not present that question. The only question presented by the Petition is whether Section 211B.11's prohibition on certain political speech in the polling place is facially overbroad. Pet. i. As the court of appeals correctly held, the statute does not have a substantial number of unconstitutional applications, relative to its legitimate reach – including its constitutional application to petitioners' "Please I.D. Me" button and Tea Party shirts. There is no compelling reason for this Court to consider a facial

overbreadth challenge to a statute that has been ruled constitutional as applied to petitioners.

A. The "Strong Medicine" of the Overbreadth Doctrine Is Not Needed.

Petitioners, who have abandoned their narrow "as-applied" challenge, now ask this Court to strike down Section 211B.11 as overbroad, even though it was constitutionally applied to petitioners. The Court should reject petitioners' attempts to minimize the burden required to strike down a statute on its face, even when First Amendment interests are involved. In light of the constitutional application of Section 211B.11 to petitioners, this case is not an appropriate vehicle to challenge any purported overbreadth of this statute.

The overbreadth doctrine constitutes a "departure from traditional rules of standing[.]" *Broadrick*, 413 U.S. at 613. If an overbreadth challenge succeeds, "any enforcement" of the regulation at issue is "totally forbidden." *Id.* This prohibition constitutes "strong medicine," which courts use "sparingly and only as a last resort." *Id.* Accordingly, this Court has held that even when statutes involve limitations on speech, "[o]nly a statute that is substantially overbroad may be invalidated on its face." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458 (1987) (citing *New York v. Ferber*, 458 U.S. 747, 769 (1982)). Before striking down a statute, this Court has "insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly

legitimate applications, before applying the 'strong medicine' of overbreadth invalidation." *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003) (internal citations omitted).

This high standard for striking down a statute is needed because "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Hicks*, 539 U.S. at 119 (quoting *Broadrick*, 413 U.S. at 615). This Court has warned that "invalidating a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects," and therefore, the Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis in original) (citing *Fox*, 492 U.S. at 485; *Broadrick*, 413 U.S. at 615).

Furthermore, "[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Id.* at 303 (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). Rather, to prevail on an overbreadth challenge petitioners "must demonstrate from the text of [a statute] *and from actual fact* that a substantial number of instances exist in which the [statute] cannot be applied constitutionally." *New York State Club Ass'n,*

Inc. v. City of New York, 487 U.S. 1, 14 (1988) (emphasis added).

Because application of Section 211B.11 to petitioners' "Please I.D. Me" buttons and Tea Party shirts did not violate the First Amendment, this case is not an appropriate vehicle for this Court to examine whether Section 211B.11 could be unconstitutionally overbroad. There is no evidence in the record of inappropriate application in the last 130 years. Moreover, the statute was constitutionally applied to petitioners' apparel. Nonetheless, petitioners make the absurd argument that the statutory language could be construed very broadly to prohibit voters from wearing certain colors to polls. Pet. 22. As the court of appeals recognized in its 2013 opinion, "[w]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." App. D-10 (quoting *Broadrick*, 413 U.S. at 615-616). Because the actual facts show a much more limited scope of Section 211B.11, review of petitioners' facial challenges is not needed.

B. The Court of Appeals Correctly Held that Section 211B.11 Is Not Substantially Overbroad.

Petitioners' argument that Section 211B.11 is unconstitutionally overbroad is centered entirely on their contention that to the extent that it prohibits certain "political" apparel from the polling place, rather than only banning "campaign" apparel, i.e., apparel that

explicitly identifies a political party, candidate, or ballot question, it is unconstitutional on its face. Pet. 10, 21. There is no dispute that Section 211B.11 prohibits certain partisan material within the polling place that is not campaign material. However, preventing individuals from both wearing "campaign" material and "political" material – both designed to express support for a particular political ideology and to influence or impact voters *while they are in the polling place on Election Day* – is a "reasonable" limitation on speech, considering the narrow purpose of the polling place as a nonpublic forum.

1. The polling place is a nonpublic forum, and speech restrictions must be reasonable and viewpoint neutral.

The court of appeals' unanimous holding that the interior of a polling place is a nonpublic forum – in which speech restrictions need only be reasonable and viewpoint neutral – is solidly grounded in this Court's precedent. For more than thirty years, the forum analysis has been "a fundamental principle of First Amendment doctrine." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984) (citing *Perry Educ. Ass'n*, 460 U.S. at 46); *see also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech.") (footnote omitted).

The forum analysis is predicated on the fact that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800. As a result, this Court has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* at 800. This Court has identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802.[2]

A forum analysis of speech restrictions within polling places must focus on the intended purpose of polling places and the activity that takes place within them. Statutes limiting political activity in and around polling places like Section 211B.11 have been in effect in every state for many years. In *Burson*, this Court

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[2] The Supreme Court has more recently described the third category, the nonpublic forum, as a "limited public forum." *See Christian Legal Soc'y*, 130 S. Ct. at 2984 n.11. This change in terminology of the third category has not changed the governing standard, as a "limited public forum," like a "nonpublic forum," may be "'limited to use by certain groups or dedicated solely to the discussion of certain subjects,'" and a governmental entity "'may impose restrictions on speech that are reasonable and viewpoint-neutral.'" *Id.* (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)). Respondents will refer to this third category as a nonpublic forum, as the court of appeals did.

employed the forum analysis in its review of a Tennessee statute that is extremely similar to Section 211B.11. 504 U.S. at 193 (1992) (plurality). The statute at issue in *Burson*, Tenn. Stat. § 2-7-111(b), created a "campaign-free zone" within 100 feet of the entrance to a polling place and the building in which the polling place was located by prohibiting "campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question." *Id.* at 193-94. The plurality first concluded that because the campaign-free zones included sidewalks and streets adjacent to polling locations, the law banned speech in *public* forums and was therefore subject to exacting scrutiny. *Id.* at 196 n.2, 198.

The Court then considered whether the Tennessee law satisfied exacting scrutiny. The Court examined the history of voting procedures in the United States, including specifically the characteristics of an official ballot and ballot secrecy. *Id.* at 202. The Court noted that "all 50 States limit access to the areas in and around polling places," *id.* at 206 (citations omitted), and then stated:

> In sum, an examination of the history of election regulations in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part

> by a restricted zone around the voting compartments. We find this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

Id. Although the Court "reaffirm[ed] that it is the rare case in which . . . a law survives strict scrutiny," it concluded that the Tennessee statute met the standard because "[a] long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect" voters' right "to cast a ballot in an election free from the taint of intimidation and fraud." *Id.* at 211.

In contrast to the public space (sidewalks and streets) outside a polling place addressed in *Burson*, the forum at issue here is the interior of the polling place itself – a highly regulated location, supervised by election officials, where individuals (1) confirm they are registered to vote or register to vote; (2) receive a ballot; (3) vote at a private voting station; (4) turn in their ballot to be counted; and then (5) leave. *See* Minn. Stat. §§ 204C.06, 204C.10, 204C.13. In practice, the inside of a polling place has never been a traditional public forum like a public park, street, or sidewalk – in other words, it is not a space "devoted to assembly and debate." *Burson*, 504 U.S. at 196, quoting *Perry Educ. Ass'n*, 460 U.S. at 45; *see also Burson*, 504 U.S. at 214, 216 (Scalia, J., concurring in the judgment) ("[R]estrictions on speech around polling places on election day are as venerable a part of the American tradition

as the secret ballot," and "the environs of a polling place, on election day, are simply not a 'traditional public forum[.]'").

Instead, the interior of the polling place can only be considered a nonpublic forum, reserved for its singular intended use: "each voter's communication of his own elective choice . . . carried out privately – by secret ballot in a restricted space." *Marlin v. District of Columbia Bd. of Elections and Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001). Therefore, it is not surprising that every court to consider the issue has concluded that the interior of a polling place on Election Day is a nonpublic forum. *See PG Publ'g v. Aichele*, 705 F.3d 91, 100 (3d Cir. 2013); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004); *Marlin*, 236 F.3d at 719; *Am. Fed'n of State, County & Mun. Employees, Council 25 v. Land*, 583 F. Supp. 2d 840, 847-848 (E.D. Mich. 2008); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364-365 (S.D.N.Y. 2007); *Ramos v. Carbajal*, 508 F. Supp. 2d 905, 919 (D. N.M. 2007); *see also Poniktera v. Seiler*, 104 Cal. Rptr. 3d 291, 302 (Cal. Ct. App. 2010) ("The comments of both Justice Scalia's concurring opinion in *Burson*, as well as the dissent, confirm our reading that *Burson* understood it was *not* approving the application of strict scrutiny to restrictions on conduct *within* the confines of the polling station[.]") (emphasis in original).

Because the interior of a polling place is a nonpublic forum, the appropriate test for analyzing the constitutionality of Section 211B.11's limitation on

individuals wearing "a political badge, button, or other political insignia" is whether the restriction is viewpoint neutral and "reasonable in light of the purpose" served by polling places on Election Day. *Perry Educ. Ass'n*, 460 U.S. at 49. The reasonableness test grants the government significant latitude because the speech restriction "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808 (emphasis in original).

With its decisions in this case, the Eighth Circuit became the fourth circuit court to hold that the interior of a polling place was a nonpublic forum in which speech restrictions need only be reasonable and viewpoint neutral. *See* App. A-5; D-8. This holding is a logical application of the forum analysis and is in accord with *Burson*. Because the court of appeals properly analyzed the issue and applied this Court's precedent, certiorari is unnecessary.

2. Section 211B.11 is a reasonable, viewpoint-neutral limitation on speech in the polling place.

In its 2013 opinion, the court of appeals rejected petitioners' facial overbreadth challenge and concluded that Section 211B.11 has a "plainly legitimate sweep" with respect to political *campaign* speech. App. D-9. The court of appeals further concluded that Section 211B.11 was facially valid to the extent that it applied to certain political non-campaign speech, i.e., to political material unrelated to any candidate or ballot

measure. App. D-10.[3] In particular, the court of appeals noted that petitioners had not alleged any "'substantial number' of unreasonable applications in relation to the statute's reasonable applications." App. D-10 (citing *Washington State Grange*, 552 U.S. at 449 n.6). Even after petitioners' as-applied challenge was remanded, they did not produce any evidence of any unreasonable applications of Section 211B.11 – only speculation. Accordingly, petitioners do not offer any compelling argument for this Court to review the court of appeals' conclusion.

There can be no dispute that application of Section 211B.11 to political *campaign* material (e.g., "Vote for Obama") is clearly constitutional. *See Burson*, 504 U.S. at 211 (holding that a statute restricting speech "related to a political campaign" within 100 feet of the outside of a polling place survived strict scrutiny). Therefore, because application of Section 211B.11 to prohibit "political" buttons, badges, and paraphernalia that are political *campaign* material is constitutional, this statute has a "'plainly legitimate sweep,'" App. D-9 (quoting *Ferber*, 458 U.S. at 769-70). Petitioners concede this point. Pet. 10, 21.

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[3] In its 2017 opinion, the court of appeals explicitly concluded that application of this statute to petitioners' non-campaign, political shirts was constitutional. *See* A-6 ("Banning apparel with [the Tea Party] name and logo is 'reasonable because it is wholly consistent with the [state]'s legitimate interest in preserving' polling place decorum and neutrality.") (citing *Perry Educ. Ass'n*, 460 U.S. at 50).

Nonetheless, petitioners contend that even under the reasonableness standard applicable to a nonpublic forum, Section 211B.11 is facially overbroad to the extent that it reaches any political *non-campaign* material. Pet. 9. The court of appeals rejected this argument (in both its 2013 and 2017 opinions), and its decision is consistent with other circuit courts that have upheld statutes prohibiting certain non-campaign related speech from near polling places. *See Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1218-19 (11th Cir. 2009) (upholding application of 100-foot campaign-free zone to individuals soliciting voters exiting the polling place on matters *not on the ballot*); *City of Sidney*, 364 F.3d at 748 (upholding Ohio's 100-foot campaign-free zone that prevented individuals from soliciting signatures on *non-ballot related* item, even in areas that included traditional public forums such as sidewalks); *Schirmer v. Edwards*, 2 F.3d 117, 122-23 (5th Cir. 1993) (upholding Louisiana's total ban on "politicking" within a 600-foot radius of the polling place and its application to *non-ballot related* political "buttons and T-shirts").

In *Browning*, *City of Sydney*, and *Schirmer*, the courts held that application of the relevant statutes to plaintiffs' non-ballot related speech satisfied strict scrutiny because the speech at issue in each case was the area immediately outside of the polling place. Here, of course, because the speech limitation is limited to the interior of a polling place, Section 211B.11's limitation need only be *reasonable*.

Section 211B.11 has existed for more than 100 years.[4] It is one of several Minnesota laws designed to ensure that the polling place on Election Day is a place where voters can calmly and efficiently cast ballots. *See e.g.* Minn. Stat. § 204C.06 (limiting who can be in a polling place, restricting movement of non-voters within the polling place, providing a sergeant-at-arms will "keep the peace," and prohibiting lingering within 100 feet of the building in which the polling place is located). Like similar prohibitions in many other states,[5] this provision bars "a political badge, political

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[4] *See* 1893 Minn. Laws, c. 4, § 108; 1912 Minn. Laws, Ex. Sess., c. 3 §§ 13, 14.

[5] *See, e.g.*, Del. Code Title 15 § 4942 (banning "electioneering" at polling place and within 50 feet, including "wearing of any button, banner or other object referring to issues, candidates or partisan topics"); La. St. Rev. § 18:1462(A)(3-4) (banning from the inside of a polling place and within 600 feet placing or displaying "campaign cards, pictures, or other campaign literature," and "political signs, pictures, or other forms of political advertising); Mont. Code Ann. § 13-35-211(1) ("A person may not do any electioneering on election day within any polling place . . . that aids or promotes the success or defeat of any candidate or ballot issue to be voted upon at the election."); N.J. Stat. § 19:34-19 ("No person shall display, sell, give or provide any political badge, button or other insignia to be worn at or within one hundred feet of the polls or within the polling place or room. . . ."); N.D. Cent. Code § 16.1-10-03 ("No individual may buy, sell, give, or provide any political badge, button, or any insignia within a polling place or within one hundred feet . . . from the entrance to the room containing the polling place while it is open for voting. No such political badge, button, or insignia may be worn within that same area while a polling place is open for voting."); Tex. Election Code § 61.010 ("[A] person may not wear a badge, insignia, emblem, or

button, or other political insignia" from inside the polling place. Minn. Stat. § 211B.11, subd. 1. As outlined above, because a polling place is a nonpublic forum, the relevant standard for reviewing this speech limitation is whether it is "reasonable in light of the purpose which [the polling place] serves." *Perry Educ. Ass'n*, 460 U.S. at 49. This limitation on speech "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.

Section 211B.11's limitation on wearing political badges, buttons, and other paraphernalia is a reasonable method to ensure that the polling place is a location where citizens can exercise the right to vote without confusion, distraction or distress, and election officials can preserve the integrity and reliability of elections. *See Burson*, 504 U.S. at 211 (plurality) ("A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right."); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights. . . ."); *Mills*, 384 U.S. at 218 (recognizing state's power "to regulate conduct in and around polls in order to maintain peace, order and decorum there").

Thus, the court of appeals correctly concluded that Section 211B.11 was not facially overbroad, given its

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other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election, in the polling place or within 100 feet. . . .").

plainly legitimate sweep related to the purpose of a polling place, whether applied to *campaign* speech or to other *political* speech. As the court of appeals recognized in its 2013 opinion, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." App. D-10 (quoting *Broadrick*, 413 U.S. at 615-616).

In this case, of course, the statute was subsequently upheld against petitioners' as-applied challenge as well. On remand, petitioners argued that even if the statute was constitutional on its face, it was nonetheless unconstitutional as applied to what petitioners described as the "inert" or "passive" political speech of the "Please I.D. Me" buttons and Tea Party shirts.[6] The court of appeals rejected petitioners' as-applied challenge, holding that "[e]ven if Tea Party apparel is not election-related," a ban on such political material is reasonable "[i]n order to ensure a neutral, influence-free polling place[.]" App. A-6. As noted above, petitioners do not seek review of their as-applied claim.

Despite losing their as-applied challenge, petitioners persist in their assertion that Section 211B.11 is unconstitutional on its face. This is precisely the same issue that was raised in petitioners' 2013 petition for a writ of certiorari, which was denied by this Court on

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[6] The district court held that the statute was constitutional as applied to the "Please I.D. Me" buttons, *see* App. C-18 to C-19, and petitioners abandoned their claim relating to the "Please I.D. Me" buttons prior to their second appeal. App. B-9.

December 16, 2013. Given the procedural history of this case and the now-final ruling regarding Section 211B.11's constitutional application to political non-campaign material, there are no compelling reasons for this Court to grant the petition.

3. Petitioners' argument that Section 211B.11 is overbroad because everything is "political" is baseless.

Despite the constitutional application of Section 211B.11 to their political apparel, petitioners argue the statute is unconstitutionally overbroad because *everything* can be considered "political."[7] For example, petitioners assert that this statute could be applied to shirts that are red or blue. Pet. 22. This argument is built on an absurd construction of the word "political" that is not grounded in Minnesota law, common sense, or how the statute has been applied during the last 100 years.

There are no Minnesota cases construing Section 211B.11's speech limitation on wearing a "political badge, political button, or other political insignia." However, even without an explicit statutory definition, the meaning of "political" within Minnesota's anti-electioneering statute is plain and unambiguous. Under Minnesota law, words and phrases in the statute are to be given their plain and ordinary meaning. *See State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn.

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[7] Petitioners have not made a vagueness challenge to Section 211B.11. *See* App. 9 n.2.

1996). Various provisions of the same statute must be interpreted in light of each other. *See Van Asperen v. Darling Olds, Inc.*, 93 N.W.2d 690, 698 (Minn. 1958). Finally, statutes are construed to "avoid absurd or unjust consequences," *Erickson v. Sunset Mem'l Park Ass'n*, 108 N.W.2d 434, 441 (Minn. 1961), or constitutional problems, *see State ex rel. Pearson v. Probate Court of Ramsey County*, 287 N.W. 297, 302 (Minn. 1939).

The prohibition on wearing "political" paraphernalia within the polling place has a common-sense understanding. *See* Minn. Stat. § 211B.01, subd. 6 (2016) ("An act is done for 'political purposes' when the act is intended or done to influence, directly or indirectly, voting at a primary or other election."). *See also* App. I-1 to I-2 (Election Day Policy) (identifying non-campaign political material as "[i]ssue oriented material designed to influence or impact voting" and [m]aterial promoting a group with recognizable political views"). Petitioners and amici argue this Court's review is needed based on their catalogue of the type of material that they believe could be considered "political" and prohibited by Section 211B.11. *See, e.g.*, Pet. 22. Petitioners' speculation is an attempt to create overbreadth where none exists. Even if petitioners could identify a few examples of logos from organizations that should remain beyond the reach of Section 211B.11's ban, that does not upset the balance applicable to their overbreadth claim. "The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an

overbreadth challenge.'" *Williams*, 553 U.S. at 303 (quoting *Taxpayers for Vincent*, 466 U.S. at 800).

Moreover, contrary to petitioners' claims, *see* Pet. 21, concerns of voter intimidation and distraction exist even with non-campaign political speech within the limited confines of the polling place. *See, e.g.*, *Burson*, 504 U.S. at 206-07 ("Intimidation and interference laws fall short of serving a State's compelling interests because they "deal with only the most blatant and specific attempts" to impede elections. . . . [U]ndetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken."). As this Court pointed out in *Williams-Yulee v. Florida Bar*, "[t]he First Amendment does not confine a State to addressing evils [only] in their most acute form." ___ U.S. ___, 135 S. Ct. 1656, 1661 (2015).

Petitioners have not identified a substantial number of unreasonable applications relative to the statute's significant legitimate sweep. *See Washington State Grange*, 552 U.S. at 449 n.6. To the contrary, in the only concrete example to date, the statute was reasonably applied to petitioners' own political apparel, given its communication of recognizable political views. Thus, this argument does not create a need for this Court's review.

II. The Court of Appeals' Decision Does Not Conflict with Any Decisions from Other Circuits.

Petitioners also assert that review is needed because of "deep tension" among the "lower courts" regarding the constitutionality of a ban on political speech. Pet. 10-15. To the contrary, there is no split among the circuits on whether statutes can prohibit "political" material in or near the polling place. As outlined above, the Eighth Circuit joins the D.C., Fifth, Sixth, and Ninth Circuits in holding that a statute prohibiting political material in or in close proximity to a polling place does not violate the First Amendment. *See Marlin*, 236 F.3d at 718; *Schirmer*, 2 F.3d at 122-23; *City of Sidney*, 364 F.3d at 748; *Browning*, 572 F.3d at 1218-19.

In an attempt to manufacture a split among circuit courts, petitioners cite *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) and *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). These cases are focused on campaign finance regulations, when certain campaign finance reporting requirements are triggered, and the impact on groups who wish to engage in advocacy as part of the general public dialogue – not within a nonpublic forum. Similarly, amici cite *Citizens United v. FEC*, 558 U.S. 310 (2010), for their assertion that strict scrutiny must be applied to any regulation of political speech. Brief for Cato Institute, et al., as *Amici Curiae* ("Cato Am.") 7. In *Citizens United*, the Court was considering the "exclusion of a class of speakers from the *general*

public dialogue." *Id.*, 558 U.S. at 340 (emphasis added); *compare McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995) (applying exacting scrutiny to a general ban on distribution of anonymous campaign literature). In contrast to the regulations at issue in *Citizens United*, *North Carolina Right to Life*, and *Wisconsin Right to Life*, Section 211B.11 applies equally to all speakers and impacts only the interior of the polling place on Election Day, not the general public dialogue surrounding an election. The cases are obviously distinguishable, and most importantly, they do not apply the forum analysis that applies to the polling place. Accordingly, the Court should reject this attempt to manufacture a circuit court split (or a conflict with *Citizens United*) where none exists.

Amici also contend there is a circuit split based in part on the Sixth Circuit's decision in *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015). Brief for the America Civil Rights Union, et al., as *Amici Curiae* ("ACRU Am.") 8. In *Russell*, the court invalidated a 300-foot buffer zone around a polling place, concluding that although *Burson* had "created a 100-foot safe harbor," a larger 300-foot buffer could include adjacent spaces that are traditionally public fora, such as sidewalks and streets. *Id.*, 784 F.3d at 1051-52. Despite acknowledging the government's compelling interest in the buffer zone, the court concluded that the government had not met its burden to show that *Burson*'s 100-foot buffer zone was insufficient. *Id.* at 1053. No part of the *Russell* analysis conflicts with the court of appeals' conclusion that Section 211B.11 is a facially

valid regulation of speech within the interior of the polling place.

Petitioners also argue review by this Court is needed because the Oregon Court of Appeals and the United States District Court for the District of Arizona "invalidated" similar statutes to Section 211B.11. Pet. 15-18. Contrary to petitioners' claims, these two decisions do not conflict with the court of appeals' rejection of petitioners' facial challenge to Section 211B.11.

First, in *Picray v. Secretary of State*, 140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997), the Oregon Court of Appeals overturned an administrative fine imposed on a voter who wore a "political" button related directly to a ballot measure in the polling place. The Oregon Court of Appeals did *not* examine the First Amendment, did *not* apply the forum doctrine, and did *not* perform an overbreadth analysis. Instead, the challenge was predicated on the Oregon Constitution and the decision focused on whether Oregon's prohibition on wearing "political badge(s), button(s) or other insignia," Or. Stat. § 260.695(4), violated Article I, section 8 of the Oregon Constitution. *Picray*, 140 Or. App. at 594. Accordingly, the *Picray* decision, which is from an intermediate state court, and which does not even discuss the First Amendment, does not conflict with the court of appeals' overbreadth analysis in this case.

Second, in *Reed v. Purcell*, No. CV 10-2324-PHX-JAT, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010), the Court enjoined Maricopa County from applying Ariz.

Stat. § 16-1018, which punishes "[k]nowingly electioneer[ing] on election day within a polling place," to prohibit individuals from wearing Tea Party t-shirts to the polling place in the 2010 election. This case does not conflict with the court of appeals' decision for at least two reasons. First, the *Reed* court enjoined application of this statute because it concluded that Maricopa County had likely engaged in viewpoint discrimination by only applying the prohibition to the Tea Party and not to other political groups. *See* 2010 WL 4394289 at *3. For that reason, the *Reed* court concluded the plaintiffs had demonstrated a likelihood of success on their viewpoint discrimination claim, even under the applicable standard for a nonpublic forum. *Id.* Second, the court also concluded that Maricopa County had failed to identify an objective standard for the definition of "electioneering." *Id.* at *4. For that reason, the court concluded the plaintiffs had demonstrated a likelihood of success on their due process claim. Importantly, because the *Reed* Court found these infirmities, it did *not* apply this Court's forum or overbreadth analysis.

In contrast to *Reed*, here there is no dispute that Section 211B.11 and the Election Day Policy are viewpoint neutral.[8] Moreover, petitioners are not making a vagueness challenge and, unlike the lack of direction provided by Maricopa County about the meaning of the

[8] There is also no evidence in the record that Section 211B.11 was selectively applied in 2010 or in any previous or subsequent elections, though any such allegations would be irrelevant to petitioners' facial challenge.

word "electioneering," the Election Day Policy provides specific, viewpoint-neutral direction on the type of paraphernalia prohibited from the polling place on Election Day.

In sum, despite petitioners' claims to the contrary, there is no circuit split in this case, and neither *Picray* nor *Reed* conflict with the court of appeals' decision upholding Section 211B.11 against petitioners' facial challenge.

III. The Court of Appeals' Decision Does Not Conflict with Any Supreme Court Precedent.

A. The Court of Appeals' Decision Does Not Conflict with *Jews for Jesus*.

Petitioners assert that the court of appeals' decision conflicts with Supreme Court precedent – without explicitly identifying which Supreme Court precedent they rely upon for this argument. Pet. 18. It appears petitioners assert that review of the court of appeals' overbreadth analysis is needed because the court's decision conflicts with *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). Pet. 19.

The court of appeals' decision does not conflict with *Jews for Jesus*, because the speech restriction in that case is dramatically broader than Minnesota's limited speech restriction that applies only in polling places on Election Day. In *Jews for Jesus*, the Court was confronted with a resolution promulgated by the Board of Airport Commissioners for Los Angeles

International Airport. The resolution provided, in pertinent part: "the Central Terminal Area of Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity." *Id.*, 482 U.S. at 570-71. In short, this ordinance, on its face, "reache[d] the universe of expressive activity, and, by prohibiting *all* protected expression, purport[ed] to create a virtual 'First Amendment Free Zone[.]'" *Id.* at 574 (emphasis in original). Not surprisingly, the Court held that the resolution was "substantially overbroad" and "not fairly subject to a limiting construction," *id.* at 577, noting that the resolution did "not merely regulate expressive activity . . . that might create problems such as congestion or disruption of the activities of those who use [the airport,]" but that it prohibited all First Amendment activity, including "even talking and reading, or the wearing of campaign buttons or symbolic clothing," *id.* at 574-75. The Court concluded that, even if an airport was a nonpublic forum, no government interest could justify excluding all forms of protected expression from the airport and the ordinance was facially unconstitutional. *Id.* at 575.

Jews for Jesus is easily distinguishable from Section 211B.11 in several critical ways. First, unlike the resolution at issue in *Jews for Jesus*, Section 211B.11 does not purport to prohibit *all* protected expression; rather, it is limited to certain *political* material. Second, unlike an airport that is used by individuals 365 days a year to travel and by many others engaged in commerce and other activities, Section 211B.11 is limited to the inside of a polling place on Election Day, a

forum that is only used by a limited number of individuals for a brief amount of time and for one purpose: to vote. Third, Section 211B.11 does not even prohibit all buttons and t-shirts, but rather only those with "political" content. Section 211B.11 is significantly narrower in the type of speech it prohibits and the scope of the time and location where the prohibition applies than the speech prohibition at issue in *Jews for Jesus*.

Accordingly, the court of appeals' overbreadth analysis does not conflict with *Jews for Jesus*.

B. Review of the Forum Analysis Is Unnecessary Because It Is An Appropriate Test for Political Speech in a Nonpublic Forum.

Finally, petitioners imply in the petition, and amici assert, that the court of appeals' First Amendment analysis was erroneous because the court concluded that the interior of a polling place is a nonpublic forum, in which speech restrictions like Section 211B.11 are constitutional if they are reasonable and viewpoint neutral. Pet. 19; Cato Am. 4-6.[9] The court of appeals' unanimous holding on this issue is in accord with Supreme Court precedent and with every court decision that has analyzed speech restrictions within a polling place. *See supra* Section I.B.1, at 19.

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[9] This was petitioners' primary argument in their 2013 petition that was denied by this Court.

Apparently recognizing the futility of arguing that a polling place is a public forum, amici simply argue that this Court's forum doctrine should be jettisoned when analyzing limitations of political speech. Cato Am. 6. The argument that this Court's forum analysis is inappropriate when the speech at issue is *political* speech (as opposed to non-political speech) finds no support in this Court's precedent. Not surprisingly, neither petitioners nor amici cite to a single case in which a court has concluded that the forum analysis is not appropriate because the speech at issue in the particular forum was political. Instead, as detailed above, amici cite to *Citizens United*, which considered a regulation that excluded a class of speakers from the general political discourse, unlike Section 211B.11. Cato Am. 7. Amici also cite to *McCullen v. Coakley*, ___ U.S. ___, 134 S. Ct. 2518 (2014), in which this Court invalidated a 35-foot buffer zone that applied only to abortion clinics as an unconstitutional time, place, or manner regulation of speech. ACRU Am. 16. Unlike the facts presented here, *McCullen* considered a content-neutral regulation (rather than the content-based regulation of Section 211B.11) and its impact on the public sidewalks surrounding the clinics (rather than the nonpublic forum of a polling place). *Id.*, 134 S. Ct. at 2535. Neither *Citizens United* nor *McCullen* applied the First Amendment analysis applicable to petitioners' facial challenge to Section 211B.11, and as a result, these cases are inapposite.

Contrary to amici's arguments, the Court has repeatedly applied the forum analysis to content-based

restrictions aimed at "political" speech. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 725-26 (1990) (plurality opinion) (applying forum analysis and noting lower level of scrutiny applied to ban on political advertising on post office sidewalk); *Burson*, 504 U.S. at 211 (plurality) (applying forum analysis to law limiting "campaign speech" in public forum); *Cornelius*, 473 U.S. at 809 (applying forum analysis to uphold ban on legal defense and political advocacy groups from charity drive aimed at federal employees in nonpublic forum because "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"); *Greer v. Spock*, 424 U.S. 828, 838-39 (1976) (applying forum analysis and upholding regulation preventing political campaigning on nonpublic forum – a military base); *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding city's refusal to accept political advertising on city buses); *see also Bryant v. Gates*, 532 F.3d 888, 896-97 (D.C. Cir. 2008) (holding that prohibition on "political" advertisements in Civilian Enterprise Newspapers (CENs), distributed on nonpublic fora of military installations, was reasonable in light of purpose of forum).

The fact that Section 211B.11's content restriction is aimed at "political" speech does not change the analytical framework from the traditional forum analysis to a per se rule requiring heightened scrutiny. The forum analysis was properly applied by the court of appeals to the statute challenged here, and as a result, there is no need for this Court to review the court of

appeals' decision rejecting petitioners' facial challenge to Section 211B.11.

CONCLUSION

Minnesota law, like that of every other state, has long protected the sanctity of the polling place by creating a zone in which the only occurrence is voting-related activity. A critical piece of this protection is Section 211B.11, a reasonable and viewpoint-neutral restriction on wearing "a political badge, political button, or other political insignia" inside the polling place. The court of appeals correctly concluded that this restriction was not facially overbroad. Respondents respectfully request that the Court deny the petition.

Dated: September 1, 2017

Respectfully submitted,

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MINNESOTA VOTERS ALLIANCE, et al.,
Petitioners,

v.

JOE MANSKY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Minnesota Statute Section 211B.11 bans political apparel in polling places across the state. Although the State[1] acknowledges the obvious "First Amendment interests [] involved," Brief In Opposition (BIO) 12, it insists that it can create speech-free zones without running afoul of the Free Speech Clause. BIO 38. This Court should settle the debate. First, the State did nothing to cast doubt on the significant tension among the lower courts over the question presented. The State attributes much to certain distinctions, but none of those distinctions make a difference here. Second, the State's efforts to reconcile the disagreement between the court below and decisions of this Court are unpersuasive. This Court has never countenanced speech-free zones at polling places. Rather, it has held that bans on First Amendment activity are unconstitutional, regardless of the forum. *Bd. of Airport Comm'rs of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 573–74 (1987). Finally, the State misunderstands this Court's overbreadth jurisprudence. The record in this case makes it a particularly good vehicle for review on an issue that both sides agree is one of nationwide importance.

I

THE STATE CASTS NO DOUBT ON THE DEEP TENSION AMONG THE LOWER COURTS OVER THE QUESTION PRESENTED

The Petition in this case presents the important, widespread, and recurring question of

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[1] For purposes of this reply, "the State" refers to all respondents.

whether the government may ban all political speech. Pet. 10–18. There is significant tension among the circuit courts over whether a blanket ban on political speech can ever be reconciled with the First Amendment. The State wholeheartedly embraces the decisions in its favor—adding even another to its lot. BIO 22 (citing *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004)).[2] Yet it attempts to soften the tension with its gloss on cases falling on the other side of the ledger. BIO 30.

First, the State claims that unlike the unconstitutionally overbroad laws in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) and *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), Minnesota's Political Apparel Ban applies equally to all speakers. BIO 30. But that was also true in *Bartlett*, which involved a ban on corporate expenditures for "political purpose[s]"—conservative or liberal. *Bartlett*, 168 F.3d at 713. And that was true in *Barland*, which involved a law concerning committees that are formed to influence elections—in favor of Republicans or Democrats. *See Barland*, 751 F.3d at 833.

The State also attributes significance to the fact that *Bartlett* and *Barland* "do not apply the forum analysis that applies to the polling place." BIO 30. But there is none. Speech-free zones violate the Free Speech Clause, regardless of forum. *See Jews for*

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[2] Although that case involved solicitation rather than political apparel, Petitioners agree with the State's hint that further percolation is unwarranted. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Jesus, 482 U.S. at 573–74 (invalidating speech-free zone in airport). Although the State cites lower court decisions for its (ultimately irrelevant) statement that polling places are nonpublic forums, BIO 1, it eventually acknowledges, that even in "nonpublic forum[s], no government interest could justify excluding all forms of protected speech." BIO 34; *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (holding that airports are nonpublic forums where First Amendment protections nonetheless exist).

The State's efforts to distinguish decisions from the Oregon Court of Appeals and the United States District Court for the District of Arizona are similarly unpersuasive. The Oregon Court of Appeals, in *Picray v. Secretary of State*, 140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997), invalidated an Oregon law that was virtually identical to the Political Apparel Ban. Pet. 16–18. It makes no difference that the decision was grounded in the Free Expression Clause of the Oregon Constitution, because the Oregon court analyzed the question in a way that would have been wholly appropriate if the case had been brought under the First Amendment. The State points to no decision that says otherwise. BIO 31.

The State claims that viewpoint neutrality distinguishes this case from *Reed v. Purcell*, No. CV 10-2324-PHX-JAT, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010). BIO 32. Not so. In addition to viewpoint discrimination, the *Reed* court noted the problems with "misuse of discretion." *Id.* at *4. Overbroad bans on speech invite that misuse by creating an "excessively capacious cloak of administrative or

prosecutorial discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991). Thus, one of the dangers with the State's open attempt to create a "controlled environment" is the fact that someone must be exercising the levers of control. BIO 4.

The State is wrong when it claims that *Reed* has nothing to do with the overbreadth doctrine. BIO 32. Although the *Reed* court did not explicitly invoke the overbreadth doctrine, it plainly conducted overbreadth analysis. For example, the court observed that the law may cause voters to forgo wearing red or blue t-shirts at the polls. *Reed*, 2010 WL 4394289, at *1. The State derides this observation as "absurd," but that does not make it so. BIO 14, 26. If a *New York Times* article could serve as a basis for a ban on Tea Party apparel, as the court below said it could, App. B-25 to B-26, then there is no reason why the same sort of evidence could not be used to ban red or blue shirts. *Cf.* David Leonhardt, *How Red States Turn Blue (and Vice Versa)*, New York Times, Oct. 13, 2016.[3] (using red to denote states that voted Republican and blue to denote states that voted Democrat). Perhaps the State seeks to assure the Court that the "mercy of a prosecutor" will stand between Minnesota voters wearing colored shirts and criminal and civil penalties. *United States v. Stevens*, 559 U.S. 460, 477 (2010). But this Court will "not uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly." *Id.* at 480.

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[3] https://www.nytimes.com/2016/10/13/opinion/campaign-stops/how-red-states-turn-blue-and-vice-versa.html?mcubz=0.

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The State's Brief in Opposition contains rote recitations of favorable language from this Court's overbreadth decisions. BIO 12–13. Yet a careful application of those decisions to the facts here reveals that the Political Apparel Ban violates the overbreadth doctrine. First, the State's insistence on forum analysis (BIO 15) does not square with this Court's decision in *Jews for Jesus*, which invalidated a speech-free zone on overbreadth grounds without conducting forum analysis. *See Jews for Jesus*, 482 U.S. at 573–74. As noted above (at 3), this Court later determined that an airport is a nonpublic forum. *See Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 679. Thus, if a ban on speech can violate the overbreadth doctrine in the nonpublic forum of an airport, it can violate the overbreadth doctrine in the nonpublic forum of a polling place.

Second, the State errs when it says that any overbreadth in the law here is not substantial. BIO 7, 27. As the undisputed record makes plain, the Political Apparel Ban sweeps much more broadly than the law at issue in *Burson v. Freeman*, 504 U.S. 191 (1992). The State concedes that Minnesota prohibits not just shirts that say "vote for Hilary" or "vote for Trump," but also shirts, caps, and buttons that say "Don't tread on me," "Liberty," "We'll remember in November," and "Fiscal Responsibility, Limited Government, Free Markets." BIO 3. The State's position here is entirely consistent with its earlier statements that it would enforce its ban not just against apparel with a Tea Party logo, but also against

apparel of MoveOn.Org, the Chamber of Commerce, and the AFL-CIO. Pet. 24. Judge Shepherd further noted in his separate opinion that the ban applies to shirts that say "American Legion," "Veterans of Foreign Wars," "NRA," "NAACP," or that bear the logo of any of those organizations. App. D-18. Those examples show substantial overbreadth.

Confronted with these examples, the State claims that there is "no evidence of unreasonable applications." BIO 21. But that is only because the State did not make its expansive view of Section 211B.11 known until the eve of Election Day 2010, BIO 3, and because it has prevailed in the lower courts for the last seven years. Only this Court can have the final word on whether the statute is facially overbroad based on the likely potential applications. For now, it is notable that the State does not even attempt to distinguish Petitioners' example of unreasonable speech restrictions. Pet. 31. The State offers only boilerplate that it is afforded "significant latitude" and that a speech restriction "need not be the most reasonable" limitation. BIO 20. Tellingly, although speech restrictions in a nonpublic forum must be both viewpoint neutral *and* reasonable, BIO 20, the State does not provide the Court with a single example of an *unreasonable* restriction at the polling place.

That is no accident. Although the State occasionally argues that its ban does not "prohibit all protected expression," only "certain political material," BIO 34, it later reveals that the statute creates a zone in which the only permitted expressive activity is voting. BIO 38. After all, anything less than a complete speech ban might interfere with voters' ability to "calmly and efficiently cast ballots." BIO 23.

That is not to say that a ban on *political* expression would fare any better in this Court. "[T]he First Amendment has its fullest and most urgent application to" political speech. *Burson*, 504 U.S. at 196. It makes little sense to allow the government to evade overbreadth analysis when it takes away core First Amendment rights only because it has left the periphery of those rights intact.

The State is also incorrect when it says that the ban is a "logical and straightforward application of *Burson*." BIO 1. *Burson* upheld a restriction on campaign-related paraphernalia at the polling place in light of the government's interests in preventing voter intimidation and election fraud. *Burson*, 504 U.S. at 206. Neither interest is implicated by a law that bans speech concerning issues not on the ballot or simply referencing—via a logo—the existence of a group that engages in advocacy. And although the restriction in *Burson* might have protected the right to vote, *id.* at 211, the sheer breadth of the Political Apparel Ban chills the exercise of that right. It is easy enough to avoid wearing a shirt that campaigns for candidates or endorses ballot issues. But political messages "can be found everywhere if one looks hard enough." *Reed*, 2010 WL 4394289, at *4. It is no stretch to think that some voters may be chilled from going to the polling place if doing so could subject them to criminal and civil penalties at an election judge's whim.

III

THE STATE'S VEHICLE CONCERNS ARE MISGUIDED AND THE STATE CONCEDES THAT THE ISSUE PRESENTED IS IMPORTANT

The State suggests that, because the Eighth Circuit held that the Political Apparel Ban was constitutionally applied to Petitioners' apparel, this Court should not review Petitioners' facial overbreadth challenge. BIO 14.

The State is incorrect because Petitioners' facial claim is distinct from the previously decided as-applied claim. Under the First Amendment, a speech restriction is facially overbroad if a substantial number of its applications are unconstitutional, judged in relation to the law's plainly legitimate sweep. *Stevens*, 559 U.S. at 473. Contrary to the State's assertion, BIO 12, Petitioners did not abandon anything by seeking certiorari on their facial, rather than as-applied, claim. After all, "an overbreadth challenge inquires into the constitutionality of [a] regulation as applied to hypothetical third parties, without regard to its constitutionality as applied to the plaintiff." *Farrell v. Burke*, 449 F.3d 470, 483 (2d Cir. 2006) (Sotomayor, J.). Here, that means this Court gets the last word on whether Minnesota may ban Tea Party apparel that invoke classic American phrases such as "Liberty" and "Don't tread on me" at the polling place. The difference in an overbreadth claim is that the Court is not confined to the facts in this case, but may also consider whether Minnesota's statute effectively bans a host of other political apparel in the polling place, such as those that feature

the logos of the Chamber of Commerce, the AFL-CIO, and so on.

In fact, the record in this case makes it a particularly good vehicle for review. Claims of facial invalidity often rest on speculation. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Factual disagreements on whether a particular statute is likely to be applied to particular conduct can complicate an overbreadth case. *See Stevens*, 559 U.S. at 473. Here, however, the parties largely agree on the scope of apparel encompassed by the Political Apparel Ban. Minnesota has consistently held the view that it may ban the Tea Party apparel and "Please I.D. Me" buttons here.[4] The State has never retreated from its concession at oral argument that the ban also reaches apparel of the Chamber of Commerce and the AFL-CIO. Pet. 7. Although the State derides some applications (red and blue shirts) as absurd, it has never challenged Judge Shepherd's conclusion that the statute applies to even more

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[4] Petitioners take exception to the State's accusation that the "Please I.D. Me" buttons were "part of an orchestrated effort to disrupt the polling place by asking voters to produce a Minnesota I.D." BIO 2, 9. The Eighth Circuit found that this assertion must have been based on "argument and evidence from some source outside the four corners of the complaint." App. D-12 (citation omitted). At the summary judgment stage, the district court found only that the buttons *could* cause confusion, not that they caused confusion. App. E-16. In any event, as the district court noted, another provision of Minnesota law already prevents voters from "deceiving another individual regarding . . . qualifications of voter eligibility." App. E-17 (citing Minn. Stat. § 204.035, subd. 1 (2010)). What is more, because the Political Apparel Ban encompasses all sorts of apparel, the law is overbroad whether or not it could be constitutionally applied to just a single type of button.

apparel—those featuring the logo of the NAACP, the NRA, and others. Pet. 8.[5] The State urges those other organizations to correct the law's infirmities "in future as-applied challenges." BIO 2. But the whole point of the overbreadth doctrine is to prevent a statute "from inhibiting the speech of third parties who are not before the Court." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

The State also argues that review is unwarranted because an overbreadth claim should be used only as a last resort. BIO 12. As the State acknowledges elsewhere, Petitioners already tried other options, including an as-applied claim. Only now, for the first time since Petitioners filed their complaint seven years ago, does the interlocutory posture of the case no longer present a barrier to this Court's review. *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 132 S. Ct 2535, 2536 (2012) (Alito, J., concurring in the denial of certiorari).

This case presents an excellent vehicle for this Court to review a question of nationwide importance. The State concedes that Minnesota's Political Apparel Ban operates "like similar prohibitions in other states." BIO 23. And the State acknowledges that "[s]tatutes limiting political activity in and around polling places like Section 211B.11 have been in effect

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[5] There are minor disagreements about whether red and blue shirts could be encompassed under the Political Apparel Ban. BIO 14, 26. That debate does not make a material difference in this case. Regardless of whether Minnesota has the statutory authority to ban colored shirts, the Political Apparel Ban is overbroad.

in every state for many years." BIO 16. Under the State's rationale, such statutes are permissible as long as they are reasonable and viewpoint-neutral—and the State has never acknowledged the possibility of an unreasonable application of a speech ban, even when challenged by the Circuit Court judges at oral argument. Pet. 7 (citing oral argument). The decision below, if allowed to stand, invites states to enact speech-free zones at polling places around the Nation. Only this Court can prevent that untoward result.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: September 2017.

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To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE AND *AMICUS CURIAE* BRIEF OF THE CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, the Center for Competitive Politics moves for leave to file the attached *amicus curiae* brief in support of the petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in the instant matter. All parties were timely noticed, pursuant to Rule 37.2(a), of *Amicus*'s intention to file the attached brief. Petitioners have filed a blanket consent to the filing of *amicus curiae* briefs in this case. Respondent Steve Simon, Secretary of State for Minnesota has consented to the filing of this brief, the remaining Respondents, however, have not consented.

The Petition asks whether it is acceptable for a government to bar issue speech inside a polling place, even when the issue speech is unrelated to any candidate campaign. This question is of critical interest to *Amicus* Center for Competitive Politics, a nonprofit corporation dedicated to the protection and defense of the political rights ensured by the First Amendment. *Amicus* often represents clients in state and federal courts, including before this Court, on matters related to the regulation or suppression of issue speech.

Accordingly, *Amicus* respectfully requests that this Court grant its motion for leave to file.

Dated: July 3, 2017

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Competitive Politics is a nonpartisan, nonprofit organization that works to protect and defend the First Amendment rights of speech, assembly, and petition. As part of that mission, the Center represents individuals and civil society organizations, *pro bono*, in cases raising First Amendment objections to burdensome regulation of core political activity. In addition, the Center has participated as *amicus curiae* in many of this Court's most important First Amendment cases, including *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

SUMMARY OF THE ARGUMENT

In-person voting always has, and hopefully always will, require citizens with disagreements about policy and politics to share a communal space as they wait to cast their ballots. The State of Minnesota believes that apparel conveying any "political" idea threatens to destroy this harmony and cause chaos at the polling place. Consequently, it has banned such messages, a policy enforced by election judges.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37.

This Court's precedents regarding security of the polling place and elections do not command such an outcome, and other precedents counsel in favor of a narrow, bright-line rule prohibiting only messages that expressly advocate for candidates on the ballot.

Otherwise, Americans ought to be able to briefly tolerate messages they may disagree with, especially during the defining moment at which citizens collectively choose their representatives. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-272 (1971) (it is "conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people'") (quoting *Roth v. United States*, 352 U.S. 476, 484 (1957)).

Declining review will only encourage the illiberal assumption behind Minnesota's law: that Americans are incapable of being around those with whom they disagree. That assumption is unproven, and cannot survive strict scrutiny. The Petition should be granted.

ARGUMENT

I. *Burson v. Freeman*, which is deeply rooted in a particular, inapplicable history, does not control.

The Eighth Circuit invoked *Burson v. Freeman*, 504 U.S. 191 (1992), to supply a governmental interest served by Minnesota's speech ban. *E.g.* Pet. App D-8 But *Burson* is a narrow exception to the general rule, enshrined in the First Amendment, that "[t]o permit the continued building of our politics and culture...our people are guaranteed the right to

express any thought, free from government censorship." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). *Burson*'s exception was rooted in a particular history, and cannot bear the weight the Eighth Circuit would place upon it.

The *Burson* Court upheld a limited ban on polling-place electioneering. But that ruling was based in large part upon late 19th and early 20th Century decisions to adopt certain measures designed to protect the franchise, principally the secret ballot and a curtilage against electioneering in and around polling places. *Burson*, 504 U.S. at 206 ("In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution..."). The Court chose not to dislodge this "time-tested consensus." *Burson*, 504 U.S. at 206; *also id.* at 205 ("The roots of Tennessee's regulation can be traced back to two provisions passed during this period of rapid reform"). But that decision was primarily driven by the specific history of voter intimidation and voter fraud conducted by perfidious "campaign workers" out to win at any cost. *Burson*, 504 U.S. at 204 ("'In earlier times our polling places were frequently, to quote the litany, 'scenes of battle, murder, and sudden death,'" but because of an 1888 New York statute, "[t]his also has come to an end...") (citation omitted).

Beyond physical mayhem, the Court also pointed to evidence that the absence of such arrangements may have actually flipped the outcome of certain elections. *Id.* at 201 n.6 ("Evans reports that

the bribery of voters in Indiana in 1880 and 1888 was sufficient to determine the results of the election..."); *see also* Paul F. Boller, *Presidential Campaigns: From George Washington to George W. Bush*, p. 160 (Oxford University Press 2004) (noting a popular schoolyard song that circulated regarding the 1888 Indiana election, "Steamboat coming 'round the bend; Goodbye, old Grover, goodbye[;] Filled up full with Harrison's men; Goodbye, old Grover, goodbye!"); "1888 Presidential General Election Results – Indiana", United States Election Atlas, (Benjamin Harrison defeated President Cleveland in Indiana by 2,348 votes).[2]

Thus, the *Burson* Court identified the historical danger of political *campaigns* operating "in and around the polls" and directly upsetting "peace, order, and decorum," *Mills v. Ala.*, 384 U.S. 214, 218 (1966), by fighting "[s]ham battles...to keep away elderly and timid voters of the opposition." *Burson*, 504 U.S. at 202. Accordingly, it approved, under strict scrutiny, the narrow rules established in response to that crisis. *Id.* at 200 ("While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places"); *Republican Party v. Minn.*, 416 F.3d 738, 749 (8th Cir. 2005), *cert. denied sub nom. Dimick v. Republican Party*, 546 U.S. 1157 (2006) ("The strict scrutiny test requires the state to show that the law

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[2] Available at: http://uselectionatlas.org/RESULTS/state.php?year=1888&fips=18&f=0&off=0&elect=0

that burdens the protected right advances a compelling state interest...").[3]

But even at the time, Justice Stevens, joined by Justices O'Connor and Souter, questioned the Court's reliance upon century-old history in a strict scrutiny case. *Burson*, 504 U.S. at 222 (Stevens, J., dissenting) ("Never have we indicated that tradition was synonymous with necessity"). That objection has even greater salience where the facts do not implicate that history. There is no evidence of anything remotely similar to America's 19th Century voter crisis occurring in Minnesota, nor was Petitioner's personal decision to wear a particular shirt analogous to the organized violence *Burson* sought to prevent.

The *Burson* Court's reasoning does not apply to the statute challenged here, and its narrow exception to the general First Amendment prohibition on speech bans cannot save Minnesota's overbroad law.

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[3] The court of appeals below, despite its reliance on *Burson*, did not apply strict scrutiny. Pet. App. D-8 Rather, the court expressly distinguished *Burson*, on the ground that the polling place itself is a nonpublic forum. *Id.* Given the form of speech being discriminated against here—political speech, the most central type of expression protected by the Speech Clause of the First Amendment—strict scrutiny nevertheless ought to apply. *Mills*, 384 U.S. at 218 ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs"); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (striking down, under strict scrutiny, public sign code applying different rules to "Political" or "Ideological" signs and "Temporary Directional Signs").

II. At most, Minnesota's ban should be limited to apparel that unambiguously advocates for or against candidates on the ballot.

In addition to being properly rooted in a particular sense of history, the Tennessee ban upheld in *Burson* had the virtue of being straightforward and easily understood. Tennessee banned the display and distribution of *campaign*, as opposed to *political*, materials, and expressly prohibited "'solicitation of votes for or against any person or political party or position on a question.'" *Burson*, 504 U.S. at 193-194 (quoting Tenn. Code Ann. § 2-7-111(b) (Supp. 1991)).

Such narrow specificity is vital for a speech regulation to survive strict scrutiny. *See United States v. Harriss*, 347 U.S. 612, 625 (1954) (narrowly construing the Federal Regulation of Lobbying Act to shield unpaid persons, because the governmental interest only extended to "who is being hired, who is putting up the money, and how much"). Careful drafting is especially vital for laws that, while purporting to regulate the act of campaigning, are "susceptible to a reading necessitating" regulation of those "whose only connection with the elective process arises from completely nonpartisan discussion of issues of public importance." *Buckley v. Valeo*, 519 F.2d 821, 870 (D.C. Cir. 1975) (*en banc*).

This case provides an opportunity for the Court to reaffirm that vague efforts to regulate mere "political activity" cannot be reconciled with the First Amendment. *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972) ("On the Government's thesis every little Audubon Society chapter would be a 'political committee,' for

'environment' is an issue in one campaign after another...The dampening effect on [F]irst [A]mendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable").

Here, an individual was threatened with possible criminal prosecution for wearing a shirt with a design inspired by the Gadsden flag—a symbol of the Revolution that gave us the franchise in the first place. As this case shows, Minnesota's law contains no limiting principle on what may or may not be considered a political message.

Minnesota's failure to properly tailor its law is disappointing, but merely reflects the human tendency to see patterns and read messages into even the most universal symbols. Indeed, quite recently, the mere act of wearing an American flag pin was seen by some as support for the then-current administration or solidarity with those supportive of the Iraq war. Gilbert Cruz, "A Brief History of the Flag Lapel Pin", Time Magazine, July 3, 2008, ("But it was Richard Nixon who brought the pin to national attention...Nixon commanded all of his aides to go and do likewise. The flag pins were noticed by the public, and many in Nixon's supposed 'silent majority' began to similarly sport flags on their lapels");[4] David Wright and Sunlen Miller, "Obama Dropped Flag Pin In War Statement", ABC News, Oct. 4, 2007 ("'You know, the truth is that right after 9/11, I had a pin,' [then-Sen. Barack] Obama said. 'Shortly after 9/11,

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[4] Available at: http://content.time.com/time/nation/article/0,8599,1820023,00.html

particularly because as we're talking about the Iraq War, that became a substitute for I think true patriotism..."").[5]

Similarly, whether a voter's apparel is "issue oriented material designed to influence or impact voting," Pet. App. I-2, will turn, inherently, on the opinions of the viewer. Here, the danger of inconsistent interpretation and enforcement is compounded by Minnesota's decision to leave its intent-and-effect test to the judgment of poll workers.[6] *Cf. Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) ("No reasonable speaker would choose to" act if the "only defense to a criminal prosecution would be that its motives were pure. An intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (*per curiam*)).

Given such a "standard," all sorts of non-electoral speech will be banned—even speech that the wearer did not intend to carry a partisan message. *See* Simon P. Newman, *Parades and the Politics of the Street: Festive Culture in the Early American Republic* p. 163 (University of Pennsylvania Press 2010)

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[5] Available at: http://abcnews.go.com/Politics/story?id=3690000

[6] Even the meaning of a symbol as venerable as the Gadsden flag can vary from person to person. *See* Eugene Volokh, "Wearing 'Don't Tread on Me' insignia could be punishable racial harassment", The Washington Post, Aug. 3, 2016 (describing complaint filed with the Equal Employment Opportunity Commission regarding a co-worker's display of a Gadsden flag); available at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/03/wearing-dont-tread-on-me-insignia-could-be-punishable-racial-harassment.

(recounting that the 1790s era Federalist Party encouraged citizens to wear a black cockade as a show of solidarity during the Quasi-War, and initially viewed the positive citizen response "as evidence of a rise in the popularity of the[Adams] government," but "it seems likely that many citizens adopted the badge as evidence of their patriotism" during the crisis, as "[w]ith the end of the Quasi-War, the popularity of the black cockade faded rapidly...").[7]

Thankfully, there is no need for this Court to either overturn *Burson* or fashion a new standard out of thin air. It need merely read "political" to mean "express advocacy" or its functional equivalent, a standard that has been readily applied in the campaign finance context. *E.g. Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 555 (4th Cir. 2012) (upholding federal express advocacy requirements). That is, apparel ought only be prohibited if it "is unmistakable, unambiguous, and suggestive of only one meaning," 11 C.F.R. § 100.22(b)(1), and that meaning is "vote for or against this particular candidate on today's ballot." *See also Buckley*, 424 U.S. at 44, n.52 ("This construction would restrict application of [the policy] to

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[7] Similarly, the use of the Gadsden Flag does not demonstrate granular political views such as support for a particular candidate. If it did, what should this Court make of the United States Navy's practice of flying a version of that flag in time of war? SECNAV Instruction 10520.6 (May 31, 2002) ("To provide for the display of the first navy Jack on board all U.S. Navy ships during the Global War on Terrorism...a flag consisting of 13 horizontal alternating red and white stripes bearing diagonally across them a rattlesnake in a moving position with the motto 'Don't Tread On Me.'").

communications containing express words of election or defeat...").

Not only does this reading of "political" provide vital clarity, it would limit the government's ban to obvious campaigning for and against candidates for office. This approach both prevents subjective determinations of symbolic meaning by low-level state workers and narrows the state's regulation to accord with the specific governmental interest identified in *Burson*.

III. Left unchecked, the Eighth Circuit's reliance on a "peace, order, and decorum" interest encourages illiberal and inaccurate beliefs about the electorate.

Aside from *Burson*, the Eighth Circuit also relied on this Court's concession, in *Mills v. Alabama*, that the government has an interest in maintaining "peace, order, and decorum" on Election Day. Pet. App. D-8. Certainly, that interest was also on the mind of the *Burson* Court, which made numerous references to the late 19th Century's voting "system" where, thanks to thuggish campaign workers, "coats were torn off the backs of voters, [and] ballots of one kind...[were] snatched from voters' hands and others put in their places, with threats against using any but the substituted ballots." *Burson*, 504 U.S. at 204, n.8.

Nothing similar has been alleged here. The naked invocation of the peace and order interest, unaccompanied by any evidence supporting a well-reasoned fear that the peace will be breached, cannot satisfy strict scrutiny. There is no reason to believe that the modern polling place will be transformed into

a 19th Century tavern brawl merely because issue speech—identified with the founding symbols of the Republic or otherwise—appears on voter apparel.

Moreover, this Court's storied precedents have long preserved and celebrated the right of Americans to wear political messages, and presumed that Americans uncomfortable with particular messages are able to avoid resorting to violence. *Cohen v. Calif.*, 403 U.S. 15, 21 (1971) ("Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense"); *Org. for a Better America v. Keefe*, 402 U.S. 415, 419 (1971) ("Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability"). Mere words are not violence or a likely predicate to it, and the State has no right to suppress them under a theory that they are. *See Matal v. Tam*, 582 U.S. at ___, slip op. at 22-23 (June 19, 2017) (Alito, J., controlling op.) ("Giving offense is a viewpoint...'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'") (quoting *Street v. N.Y.*, 394 U.S. 576, 592 (1969)).

Declining to pointedly declare otherwise will only feed the illiberal assumptions undergirding Minnesota's policy, and give aid and comfort to other actors seeking to use spurious threats of violence to ban speech. Such an illiberal fantasy—a belief that individuals simply cannot help violently reacting to disfavored speech—should be rejected entirely, particularly given its logical consequences. Greg Lukianoff and Jonathan Haidt, "The Coddling of the

American Mind", The Atlantic, Sept. 2015 ("When speech comes to be seen as a form of violence, vindictive protectiveness can justify a hostile, and perhaps even violent, response")[8]; *but see Whitney v. Calif.*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears").

This Court has found merit in preventing explicit campaigning in the polling place. But extending that principle to reach general statements of political belief unrelated to the ballot is unsupported by this Court's precedents and cannot survive strict scrutiny. Doing so in order to prevent imagined violence infantilizes Americans, discounts a century of political progress, and encourages the development of a culture inimical to the free and unhindered exchange of views.

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[8] Available at: https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/

CONCLUSION

For the foregoing reasons, this Court ought to grant the writ.

Respectfully submitted,

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July 3, 2017

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No. 16-1435

In the
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, et al.,
Petitioners,

v.

JOE MANSKY, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

JOINT APPENDIX

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Chronological List of Relevant Docket Entries

United States District Court
District of Minnesota
Case No. 0:10-cv-04401-JNE-SER

Dkt.	Date	Description
1	Oct. 28, 2010	Complaint for Declaratory and Injunctive Relief
5	Oct. 29, 2010	Affidavit of Sue Jeffers
6	Oct. 29, 2010	Affidavit of Colin Wilkinson
7	Oct. 29, 2010	Affidavit of Daniel McGrath
12	Oct. 29, 2010	Declaration of Randy Liebo
14	Oct. 29, 2010	Declaration of Dorothy Fleming
16	Oct. 29, 2010	Declaration of Jeff Davis
20	Oct. 29, 2010	Violations of Chapter 211B, Appendix C of Gary Poser Declaration
28	Nov. 1, 2010	Affidavit of Joseph Mansky
42	Nov. 18, 2010	First Amended Complaint for Declaratory and Injunctive Relief
55	Jan. 6, 2011	Memorandum in Support of Motion to Dismiss by Mark Ritchie

57	Jan. 6, 2011	Gary Poser's Email, Exhibit B to Gary Poser Declaration
59	Jan. 6, 2011	Memorandum in Support of Motion to Dismiss by Mike Freeman, Rachel M. Smith
63	Jan. 6, 2011	Memorandum in Support of Motion to Dismiss by Susan Gartner, Joe Mansky
75	Feb. 11, 2011	Response to Motion to Dismiss filed by Andy Cilek, Jeff Davis, Election Integrity Watch, Dorothy Fleming, Susan Jeffers, Dan McGrath, Minnesota Majority, Minnesota Northstar Tea Party Patriots, Minnesota Voters Alliance
77	Feb. 17, 2011	Reply to Response to Motion to Dismiss filed by Mark Ritchie
81	Feb. 17, 2011	Reply regarding Motion to Dismiss, Memorandum in Support of Motion filed by Susan Gaertner, Joe Mansky

82	Feb. 17, 2011	Reply regarding Motion to Dismiss, Memorandum in Support of Motion filed by Mike Freeman, Rachel M. Smith
86	April 29, 2011	Order granting Defendants Motion to Dismiss with Prejudice
128	Oct. 15, 2014	Order: Defendant Mark Ritchie's Motion to Dismiss or for Summary Judgement is Granted in Part and Denied in Part Plaintiffs' Motion for an Order under Fed. R. Civ. P. 56(d) is Denied in Part and Denied as Moot in Part.
137	Dec. 18, 2014	Declaration of Rachel M. Smith
138	Dec. 18, 2014	Declaration of Daniel P. Rogan
154	Jan. 14, 2015	Declaration of Dan McGrath
155	Jan. 14, 2015	Declaration of Andy Cilek
156	Jan. 14, 2015	Declaration of The Minnesota Voters Alliance
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United States Court of Appeals
for the Eighth Circuit
Case No. 11-2125

Date	Description
Aug. 22, 2011	Appellants' Opening Brief
Sept. 21, 2011	Appellee's Opening Brief filed by Mark Ritchie
Sept. 22, 2011	Appellees' Opening Brief filed by Mike Freeman and Rachel Smith
Sept. 22, 2011	Appellees' Openi g Brief filed by John J. Choi, Susan Gaertner and Joe Mansky
Oct. 25, 2011	Appellants' Reply Brief
Mar. 6, 2013	Opinion Affirming District Court in Part, Reversing in Part, and Remanding in Accordance with Opinion
Mar. 27, 2013	Appellants' Petition for Panel Rehearing and Rehearing En Banc

April 19, 2013	Appellee's Response to Petition for En Banc Rehearing by Mark Ritchie
April 19, 2013	Appellees' Response to Petition for En Banc Rehearing by Mike Freeman and Virginia Gelms
April 22, 2013	Appellees' Response to Petition for en banc rehearing by John Choi and Joe Mansky
May 7, 2013	Order Denying Petition for Panel Rehearing and Rehearing En Banc
May 14, 2013	Mandate Issued
Aug. 14, 2013	Supreme Court Notice of Certiorari filed in the Supreme Court
Dec. 16, 2013	Supreme Court Order Denying Certiorari Petition

Chronological List of Relevant Docket Entries

United States Court of Appeals
for the Eighth Circuit
Case Nos. 15-1682 and 15-1741

Date	Description
June 18, 2015	Appellants' Opening Brief
July 16, 2015	Brief of Appellee/Cross-Appellant filed by Steve Simon
July 20, 2015	Brief of Appellees filed by Mike Freeman and Virginia Gelms
July 20, 2015	Brief of Appellees filed by John Choi and Joe Mansky
Aug. 24, 2015	Appellants'/Cross-Appellees' Reply Brief
Sept. 8, 2015	Reply Brief of Appellee/Cross-Appellant filed by Steve Simon
Feb. 28, 2017	Opinion Affirming the District Court and Dismissing the Cross Appeal as Moot
Mar. 21, 2017	Mandate Issued

June 2, 2017	United States Supreme Court Notice of Certiorari filed in the Supreme Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dorothy Fleming, Jeff Davis, Dan McGrath, Eugene F. Delaune II, and Randy Liebo,

Plaintiffs,

vs.

Joe Mansky in his official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her official capacity as the Elections Manager for Hennepin County, Mike Freeman in his official capacity as Hennepin County Attorney, Susan Gaertner in her Official Capacity as Ramsey County Attorney, and Mark Richie in his official capacity as Secretary of State,

Defendants.

Court File No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

FILED Oct. 28, 2010

INTRODUCTION

1. This is an action for declaratory and injunctive relief against Hennepin County, Rachel M. Smith, Elections Manager for Hennepin County, Ramsey County Elections Manager Joe Mansky, and Minnesota Secretary of State Mark Richie for the violation of the United States and Minnesota Constitutions' protection of free speech, association, and the right to vote of the individual Plaintiffs and Plaintiffs members or supporters of Minnesota Majority, Minnesota Voters Alliance, and the Minnesota Northstar Tea Party Patriots—all 501(c)(4) member organizations. Plaintiffs Minnesota Majority, Minnesota Voters Alliance, and the Minnesota Northstar Tea Party Patriots are also part of a grass roots coalition referred to as "Election Integrity Watch." The coalition designed, made and distributed a button to its members and supporters that states "Please I.D. Me."

2. Plaintiff Susan Jeffers is a Ramsey County Election Judge who has been directed to exclude eligible voters from polling places for wearing the Election Integrity Watch non-campaign button "Please I.D. Me." In addition, as an election judge, she has been directed to exclude eligible voters from polling places for wearing non-campaign shirts offered by the Plaintiff Northstar Tea Party Patriots.

3. The policies of excluding poll watchers or eligible voters for wearing non-campaign buttons or shirts have been expressly made through the Ramsey County Election Manager Joe Mansky to Ramsey County election judges; through declarations by Mike Freeman, Hennepin County Attorney; and approved, upon information and belief, by Minnesota Secretary

of State Mark Richie, the chief election officer for the State of Minnesota.

4. The statutory interpretations made and policies promulgated by County and State officials are violative of the freedom of speech, the freedom of association, and the freedom to vote as protected under the article 1 § 3 of the Minnesota Constitution and the First Amendment of the United States Constitution. Furthermore, the state and county interpretations of the statute in question show the facial unconstitutionality—and as applied—of Minn. Stat. § 211B.11 as not being narrowly tailored to meet a compelling state interest.

5. Injunctive relief is necessary to allow eligible voters to peacefully exercise their right to vote within the polling place on election day while expressing their constitutionally protected right to free speech, and to direct election judges that they may not preclude eligible voters from the polling place for wearing non- campaign shirts or buttons, inclusive of poll watchers.

JURISDICTION

6. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343 (1)-(4) and 42 U.S.C. §§ 1983, 1985(2), (3) and § 1988 (civil rights statutes) and the First Amendment of the United States Constitution.

7. This Court is authorized to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, Federal Rules of Civil Procedure 57 and 65, and has general legal and equitable powers.

8. Venue is proper in this Court under 28 U.S.C. § 1391. Plaintiffs further invokes the pendent

jurisdiction of this Court to consider claims arising under state law.

PARTIES

Plaintiffs

9. Plaintiff Minnesota Majority is a Minnesota 501(c)(4) nonprofit organization with members formed in the interest of transparency in government, protecting identified values as they interrelate with political issues, including oversight, investigation, and reform concerning election and voter or voter registration irregularities. It is an association of members. Minnesota Majority does not endorse candidates seeking elected or appointed offices.

10. Plaintiff Minnesota Voter Alliance is a Minnesota 501(c)(4) nonprofit organization with members formed with the primary purpose of empowering the electorate, with interests inclusive of the integrity of the election process. It is a non-partisan, and is not affiliated with any political party or organization. Minnesota Voters Alliance does not endorse candidates seeking elected or appointed offices.

11. Plaintiff Northstar Tea Party Patriots is a Minnesota 501(c)(4) nonprofit member organization. It is not a political party. It is a coalition of local associations in Minnesota with a mission to attract, educate, organize, and mobilize citizens to secure public policies consistent with values inclusive of fiscal responsibility, constitutionally limited government and free markets. Northstar Tea Party Patriots does not endorse candidates seeking elected or appointed offices.

12. Plaintiff Election Integrity Watch is the coalition of the Plaintiffs Minnesota Majority, Minnesota Voters Alliance, and the Minnesota Northstar Tea Party Patriots.

13. Under Minn. Stat. § 200.02, a "political party" means an association of individuals under whose name a candidate files for partisan office. Under this definition, Election Integrity Watch, Minnesota Majority, Minnesota Voters Alliance, and Minnesota Northstar Tea Party Patriots are not political parties.

14. Plaintiff Susan Jeffers is an eligible and registered voter in Minnesota, residing at 1720 20th Avenue NW, New Brighton. Ms. Jeffers is an election judge in Ramsey County, Minnesota.

15. Plaintiff Jeff Davis is an eligible and register voter in Ramsey County, Minnesota.

16. Plaintiff Dorothy Fleming is an eligible and registered voter in Hennepin County, Minnesota.

17. Plaintiff Dan McGrath is an eligible and registered voter in Hennepin County, Minnesota.

18. Plaintiff Eugene F. Delaune II is an eligible and registered voter in Ramsey County, Minnesota.

19. Plaintiff Randy Liebo is an eligible and registered voter in Hennepin County, Minnesota.

Defendants

20. Defendant Joe Mansky is the Elections Manager for Ramsey County, Minnesota. Mr. Mansky is responsible for the conduct of elections in Ramsey County such as the enforcement of statutory

prohibitions on electioneering, including but not limited to identifying eligible and ineligible voters, the conduct within polling places as it relates to campaign materials and the training and oversight of Ramsey County election judges.

21. Defendant Rachel M. Smith is the Elections Manager for Hennepin County, Minnesota. Ms. Smith is responsible for the conduct of elections in Hennepin County such as the enforcement of statutory prohibitions on electioneering, including but not limited to identifying eligible and ineligible voters, the conduct within polling places as it relates to campaign materials and the training and oversight of Hennepin County election judges.

22. Defendant Mike Freeman is the Hennepin County Attorney. He is responsible for preserving the freedom of speech of citizens and for the enforcement of laws through his office within the County including petty misdemeanors. Mr. Freeman individually and through his office is also responsible for the constitutional enforcement of statutory prohibitions on electioneering.

23. Defendant Susan Gaertner is the Ramsey County Attorney. She is responsible for preserving the freedom of speech of citizens and for the enforcement of laws through her office within the County including petty misdemeanors. Ms. Gaertner individually and through her office is also responsible for the constitutional enforcement of statutory prohibitions on electioneering.

24. Defendant Mark Richie is the Minnesota Secretary of State. As Secretary of State, Mr. Richie is the statewide election officer responsible for the

policies relating to the conduct of elections within the State. Mr. Richie directly communicates with County Election Managers, or their equivalent officials, on election matters inclusive of the conduct within polling places as it relates to election judges or other poll workers.

25. At all times relevant to the allegations of this Complaint, and in all actions described, the defendants acted under color of law and under the authority bestowed upon them as county or state officials.

Constitutional and Statute Provisions at Issue

26. The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

27. Article 1 § 3 of the Minnesota Constitution states that "all persons may freely speak, write, and publish their sentiments on all subjects . . . ."

28. Minnesota Statute § 211B.11, subd. 1 states that:

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place . . . on primary or election day to vote for or refrain from voting for a candidate or a ballot question . . . A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day

* * *

Subd. 4. . . . Violation of this section is a petty misdemeanor.

FACTS

Election Integrity Watch "Please I.D. Me" buttons are not political and are not associated with any Minnesota political campaign.

29. In preparation for the 2010 election, Plaintiffs Minnesota Majority, Minnesota Voters Alliance and the Minnesota Northstar Tea Party Patriots formed a coalition referred to as "Election Integrity Watch."

30. Election Integrity Watch is not a political party under Minn. Stat. § 200.02 which states that a "political party" means an association of individuals under whose name a candidate files for partisan office.

31. Election Integrity Watch is a concerned grass roots effort to protect election integrity.

32. Poll watchers are allowed on election day.

33. Election Integrity Watch has instructed individuals to act as poll watchers outside polling places and within them only when voting or when otherwise authorized to be in the polling place.

34. Each individual has been instructed to observe the election process only and not to interfere with any person's attempt to vote, or vote on this coming election day, November 2, 2010.

35. The Election Integrity Watch created a button that states "PLEASE I.D. ME." (See Exhibit A).

36. The Election Integrity Watch button also provides a telephone number—"877.602.WATCH."

37. The Election Integrity Watch button also provides a website "ELECTIONINTEGRITYWATCH.COM."

38. The Election Integrity Watch also has as a background for the previously referenced wording and number, a design that appears as a human eye–similar to that found on the back of the U.S. dollar bill.

39. Election Integrity Watch has disseminated its button and instructed its separate organizational members and supporters to wear the "Please I.D. Me" button on the forthcoming election day, November 2, 2010, in their respective polling places.

40. There is no ballot question for Minnesota voters to vote upon regarding voter identification or other voter identification issues.

41. There is no political campaign related to voter identification.

Minnesota Northstar Tea Party Patriots offered shirts and hats are not political endorsements of any candidate and are not associated with any Minnesota political campaign.

42. Plaintiff Minnesota Northstar Tea Party Patriots (Northstar Patriots) is not a political party under Minn. Stat. § 200.02 which states that a "political party" means an association of individuals under whose name a candidate files for partisan office.

43. The Northstar Patriots does not endorse candidates for elected office.

44. None of the associations associated with the Northstar Patriots endorse candidates for elected office.

45. Plaintiff Northstar Patriots offers to the public shirts and hats that reflect the values of the organization inclusive of subjects such as fiscal responsibility, constitutionally limited government and free markets.

46. The Northstar Patriots shirts offered have statements, phrases, or slogans such as "Don't tread on me," "Liberty," We'll Remember in November," "Fiscal Responsibility, Limited Government, Free Markets" or a drawing of a shield.

47. Each shirt or hat includes the logo "Tea Party Patriots." (See Exhibit B).

48. There is nothing in any particular shirt or that phrase or slogan that endorses, causes confusion, undue influence, or is in any other way related to a political campaign.

49. Each slogan is reflective of the wearer's association with a particular group that does not endorse candidates or ballot questions.

Minnesota Majority has done work regarding election integrity issues since prior to the 2008 election, but the Secretary of State, Hennepin County, and Ramsey County officials have opposed these efforts.

50. Plaintiff Minnesota Majority has engaged in scrutinizing election processes since prior to the 2008 election.

51. Inclusive of its studies of election processes, Minnesota Majority has examined public records regarding specific issues such as non-eligible voters—non-citizens or non-eligible felons for instance—who may have voted during the election of 2008.

52. In 2009 and most recently in 2010, the Secretary of State, Hennepin County, and Ramsey County officials have resisted attempts by Minnesota Majority to protest alleged improper procedures by the Secretary of State, or to obtain public records to examine and produce studies relating to for instance, non-citizens.

53. The Secretary of State after the filing of the Minnesota Majority's Petition before the Minnesota Supreme in 2009 regarding inaccuracies relating to the Statewide Voter Registration System, admitted that more ballots were cast than voters counted for in the thousands (*See, Minnesota Majority, et al. v. Kitt Johnson, et al.*, Court No. A09-950).

54. In 2010, the Secretary of State, Hennepin County, and Ramsey County officials fought Minnesota Majority's attempt to obtain and preserve certain State public records for purposes of study and research relating to non-citizen status and voter registration related issues. (*See, In re Minnesota Majority*, Court File No. 62-CV-10-8233).

55. The Election Integrity Watch coalition is a natural outcome of the interests of all three independent organizations working in areas of election integrity processes.

Ramsey County Election Manager, Joe Manksy, determined and has instructed that Election Integrity Watch "Please I.D. Me" buttons and "Tea Party" messages of any kind would not be allowed in polling places.

56. Plaintiff Sue Jeffers is a Ramsey County Election Judge.

57. Ms. Jeffers contacted Joe Mansky, Ramsey County Election Director regarding certain rumors relating to Election Integrity Watch "Please I.D. Me" buttons and "Tea Party" shirts on October 19, 2010.

58. Mr. Mansky stated to Ms. Jeffers that Election Integrity Watch "Please I.D. Me" buttons would be prohibited in Ramsey County polling places.

59. Mr. Mansky stated to Ms. Jeffers that "Tea Party" messages of any kind—even if they did not support or oppose a candidate, or an issue on the ballot—worn by any person, would be prohibited in Ramsey County polling place.

60. Ms. Jeffers was "shocked" at the prohibition Mr. Mansky promulgated regarding the "Please I.D. Me" buttons and "Tea Party" shirts.

61. As an election judge, Ms. Jeffers will be responsible for enforcing the Ramsey County policy of prohibiting a person in the polling place that is wearing either a "Please I.D. Me" button or a "Tea Party" shirt.

62. As an election judge, Ms. Jeffers disagrees with Mr. Mansky's policy decision of prohibiting people who are wearing "Please I.D. Me" buttons or

"Tea Party" shirts from the polling place as contrary to voting rights, free speech and association principles.

Hennepin County polling workers will prohibit the wearing of "Please I.D. Me" buttons in polling places as directed by County Attorney Mike Freeman.

63. Hennepin County Attorney Mike Freeman also publicly stated that poll watchers wearing buttons asking for their I.D. (identification) "won't be allow[ed] in polling stations." Mr. Freeman equated the Election Integrity Watch "Please I.D. Me." Buttons as campaign buttons stating, "You can't wear campaign buttons in a polling place, state law says you can't."

64. Hennepin County Election Manager Rachel Smith has stated that she considers her office obligated to follow the dictates of the Hennepin County Attorney's pronouncement on the prohibition of "Please I.D. Me" buttons in Hennepin County election polling places on November 2, 2010.

The Secretary of State as Minnesota's chief election officer and as the final arbiter of election law applicability in the polling place, will uphold decisions of County Election managers prohibiting "Please I.D. Me" buttons and Tea Party shirts.

65. Upon information and belief, the Secretary of State Mark Richie, as Minnesota's chief election officer responsible for the integrity and conduct of elections throughout the state, is the final arbiter of instructions and directions provided to

election managers, or their equivalent officials, regarding the interpretation and application of elections laws within polling places.

66. Upon information and belief, the Secretary of State endorses and will uphold the decision of county election managers to prohibit individuals from wearing "Please I.D. Me" buttons or "Tea Party" shirts as previously identified in this Complaint.

Plaintiff Jeff Davis fears prosecution for expressing his rights of freedom of speech and association for wearing a non-campaign button on election day.

67. Plaintiff Jeff Davis is an eligible voter residing in Ramsey County and is an advocate of the Election Integrity Watch effort. He has a "Please I.D. Me" button, wears, and will wear that button into the polling place on November 2, 2010.

68. Mr. Davis views the "Please I.D. Me" button as an expression of free speech that does not support any Minnesota political campaign ballot question or candidate.

69. Mr. Davis further views the "Please I.D. Me" button as an expression of his association with the grass roots coalition of Election Integrity Watch.

70. Mr. Davis is aware of the pronouncements of Defendant Joe Mansky prohibiting "Please I.D. Me" buttons from polling places.

71. Mr. Davis is also aware that he can be prosecuted under Minn. Stat. § 211B.11 as it relates to Mr. Mansky's prohibition of the "Please I.D. Me"

buttons. As a result, Mr. Davis fears prosecution for his expression of freedom of speech and association for wearing the button "Please I.D. Me."

72. Mr. Davis is further concerned that if he does not relinquish the display of his "Please I.D. Me" button, he will be prevented from voting.

Plaintiff Randy Liebo further fears prosecution for expressing her rights of freedom of speech and association for wearing a non-campaign shirt on election day.

73. Plaintiff Randy Liebo is an eligible voter residing in Hennepin County. He is an advocate of the Northstar Patriots effort. He has a Tea Party Patriot shirt, wears it, and will wear that shirt into the polling place on November 2, 21010.

74. Mr. Liebo views the "Tea Party Patriots" shirt as an expression of free speech that does not support any Minnesota political campaign ballot question or candidate.

75. Mr. Liebo further views the "Tea Party Patriots" shirt as an expression of her association with the Minnesota Northstar Tea Party Patriots coalition to demand governmental integrity.

76. Mr. Liebo is aware of the pronouncements of Defendant Joe Mansky prohibiting "Tea Party Patriots" shirts from polling places. He is further concerned that the pronouncement of Joe Mansky's directive of Minnesota's election laws will be enforced in the same manner in Hennepin County.

77. Mr. Liebo is also aware that he can be prosecuted under Minn. Stat. § 211B.11 as it relates to any enforced prohibition of the "Tea Party Patriots" shirts in or around polling places. As a result, he fears prosecution for his expression of speech and his association with the Northstar Patriots for wearing the "Tea Party Patriots" shirt.

78. Mr. Liebo is further concerned that if he does not relinquish the display of his "Tea Party Patriots" shirt, he will be prevented from voting.

Plaintiffs Dan McGrath and Dorothy Fleming fear prosecution for expressing their rights of freedom of speech and association for wearing a non-campaign button on election day.

79. Plaintiff Dan McGrath and Plaintiff Dorothy Fleming are eligible voters residing in Hennepin County and are advocates of the Election Integrity Watch effort. They have "Please I.D. Me" buttons, wear them, and will wear the buttons into the polling place on November 2, 2010.

80. They view the "Please I.D. Me" button as an expression of free speech that does not support any Minnesota political campaign ballot question or candidate.

81. They further view the "Please I.D. Me" button as an expression of their association with the grass roots coalition of Election Integrity Watch.

82. They are aware of the pronouncements of Defendant Mike Freeman, Hennepin County Attorney, not to allow "Please I.D. Me" buttons in polling places—viewing them as campaign buttons.

83. They are also aware that they can be prosecuted under Minn. Stat. § 211B.11 as it relates to Mr. Freeman's pronouncement that wearing of the "Please I.D. Me" button is a violation of state law. As a result, they fear prosecution for their expression of speech and their association with Election Integrity Watch for wearing the button "Please I.D. Me."

84. Mr. McGrath and Ms. Fleming are concerned that if they do not relinquish the display of their respect "Please I.D. Me" buttons, they will be prevented from voting.

COUNT I

Violation of the First Amendment of the United States Constitution and Threats to the Plaintiffs' Right to Vote

85. The Plaintiffs adopts and incorporates by reference paragraphs 1 through 84 as if fully stated.

86. The First Amendment of the United States Constitution guarantees individuals the right to free speech and association.

87. The First Amendment of the United States Constitution guarantees individuals the right to vote.

88. The Defendants either intentionally, recklessly, or with callous indifference to the federally protected rights of the Plaintiffs have threatened, silenced, or chilled their rights to freedom of speech and association by the improper adoption of policies prohibiting the wearing of non-campaign "Please I.D. Me" buttons of the Election Integrity Watch, or shirts (or hats) expressing certain slogans, phrases, or

statements as offered by the Minnesota Northstar Tea Party Patriots.

89. Neither the "Please I.D. Me" buttons nor the "Tea Party Patriots" shirts attempt to persuade or influence voters to vote for or against any particular candidate, ballot question, or political party in the November 2, 2010 election.

90. The Defendants' policies were established causing irreparable harm to the federally protected rights of the Plaintiffs' freedom of speech and association, to harass, threaten, silence, and chill these constitutional rights by directing election judges, poll workers, or others responsible for the conduct of elections and voters in polling places to prohibit the Plaintiffs' presence in or around polling places.

91. The Defendants have further failed to properly educate, train, and instruct election judges, poll workers, or others responsible for the conduct of elections and voters in polling places in the proper enforcement of election laws, namely Minn. Stat. § 211B.11, in a manner to avoid the threatened intentional, reckless, or callous indifference to the Plaintiffs' federally protected rights of freedom of speech and association.

92. Further, the enforcement of the Defendants' directives threatens to deprive the Plaintiffs of their right to vote without due process of law.

93. An actual live controversy exists between the Plaintiffs and the Defendants in which the parties have genuine and opposing interests that

are direct and substantial and of which a judicial determination will be final and conclusive.

94. Plaintiffs request this Court to issue declaratory and injunctive relief under 42 U.S.C. §1983 to cease and prevent the Defendants' conduct of intentional, reckless, and oppressive disregard of Plaintiffs' First Amendment rights, and further award appropriate monetary damages against the Defendants, with the exception of the Secretary of State, inclusive of costs, attorney fees, and any other relief as this Court deems justified.

COUNT II

Violation of Article 1 § 3 of the Minnesota Constitution Protections of Freedom of Speech and Association and Threats to Plaintiffs' Right to Vote.

95. The Plaintiffs adopts and incorporates by reference paragraphs 1 through 94 as if fully stated.

96. Article 1 § 3 of the Minnesota Constitution guarantees individuals the right to free speech and association.

97. Article 1 § 3 of the Minnesota Constitution guarantees individuals the right to vote.

98. The Defendants either intentionally, recklessly or with callous indifference to Minnesota's constitutionally protected rights of the Plaintiffs have threatened, silenced, or chilled their rights to freedom of speech and association by the improper adoption of policies prohibiting the wearing of non-campaign "Please I.D. Me" buttons of the Election Integrity Watch or shirts (or hats) expressing certain slogans,

phrases, or statements offered by the Minnesota Northstar Tea Party Patriots.

99. Neither the "Please I.D. Me" buttons nor the "Tea Party Patriots" shirts attempt to persuade or influence voters to vote for or against any particular candidate, ballot question or political part in the November 2, 2010 election.

100. The Defendants' policies were established causing irreparable harm to Minnesota's constitutionally protected rights of the Plaintiffs freedom of speech and association, to harass, threaten, silence, and chill these constitutional rights by directing election judges, poll workers, or others responsible for the conduct of elections and voters in polling places to prohibit the Plaintiffs presence in or around polling places.

101. The Defendants have further failed to properly educate, train, and instruct election judges, poll workers, or others responsible for the conduct of elections and voters in polling places in the proper enforcement of election laws, namely Minn. Stat. § 211B.11, in a manner to avoid the threatened intentional, reckless, or callous indifference to the Plaintiffs state constitutionally protected rights of freedom of speech and association.

102. Further, the enforcement of the Defendants' directives threatens to deprive the Plaintiffs of their right to vote without due process of law.

103. An actual live controversy exists between the Plaintiffs and the Defendants in which the parties have genuine and opposing interests that

are direct and substantial and of which a judicial determination will be final and conclusive.

104. Plaintiffs request this Court to declare under the Minnesota Constitution that the Defendants have violated constitutionally protected rights and enjoin them to cease and prevent them from conducting any intentional, reckless, and oppressive act resulting in the disregard of Plaintiffs' rights to freedom of speech and association, and award appropriate monetary damages, with the exception of the Secretary of State, against the Defendants inclusive of costs, attorney fees, and any other relief as this Court deems justified.

Count III

Facially, Minn. Stat. § 211B.11 is Constitutionally Invalid Under the United States and Minnesota Constitutions.

105. The Plaintiffs adopts and incorporates by reference paragraphs 1 through 104 as if fully stated.

106. Minnesota Statue 211B.11, subd. 1 states that

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place . . . . on primary or election day to vote for or refrain from voting for a candidate or a ballot question . . . A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day
>
> * * *

> Subd. 4. . . . Violation of this section is a petty misdemeanor.

107. Plaintiffs Minnesota Majority, Minnesota Voters Alliance, and Minnesota Northstar Tea Party Patriots have formed a coalition identified as the Election Integrity Watch.

108. Election Integrity Watch is not a political party and does not endorse candidates for elected office or promote or seek to defeat ballot questions.

109. Election Integrity Watch creates and distributes "Please I.D. Me" button.

110. The statement "Please I.D. Me" is not a "political" badge, a "political" button" or a "political" insignia.

111. The "Please I.D. Me" button is not worn for a "political purpose" as defined under Minn. Stat. § 211B.01.

112. Minnesota Statute § 211B.01 defines "political purpose" as an act that is intended or done to influence, directly or indirectly, voting at a primary or other election.

113. The "Please I.D. Me" button is not campaign material as defined under Minn. Stat. § 211B.01.

114. Minnesota Statute § 211B.01 defines "campaign materials" as an act means any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.

115. Meanwhile, the State of Minnesota makes and distributes "I voted" buttons to voters in

the polling place and is allowed to do so under Minn. Stat. § 211B.11.

116. Minnesota Statute 211B contains no definition of "political." Therefore, since Election Integrity Watch is not a political party and does not endorse candidates, support or seek to defeat ballot questions, the word "political" as seen in the context of the facts of this case is facially and as applied constitutionally invalid.

117. Facially, Minnesota Statute 211B.11 is facially unconstitutional because it is not viewpoint neutral, is not narrowly tailored to meet a compelling state interest, is unconstitutionally overbroad and vague. It impedes or threatens to impede the federally protected rights of freedom of speech and association the Plaintiffs seek to achieve and practice.

118. Violation of Minn. Stat. § 211B.11 can result in criminal prosecution.

119. Election managers, election judges, poll workers, and any other person responsible with the conduct of the election process in polling places are obligated to follow and enforce the directives of the statute, which has and will result, because of the way it is written, in the unconstitutional prohibition of certain individuals, such as members or supporters of Plaintiff organizations and coalition from wearing non-campaign buttons and clothing into polling places—perhaps even discouraging them from voting which is and would be a violation of their voting rights.

120. An actual live controversy exists between the Plaintiffs and the Defendants in which the parties have genuine and opposing interests that

are direct and substantial and of which a judicial determination will be final and conclusive.

121. As a result, the Plaintiffs request this Court to declare Minn. Stat. § 211B.11 facially unconstitutional as violative of the First Amendment of the United States Constitution and the Minnesota State Constitution.

JURY DEMAND

122. Plaintiffs demand a jury trial.

REQUEST FOR RELIEF

1. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing and threatened irreparable harm from the Defendants' present and threatened irreparable harm to their constitutional rights.

2. An actual live controversy exists between the Plaintiffs and the Defendants in which the parties have genuine and opposing interests that are direct and substantial and of which a judicial determination will be final and conclusive.

3. The Plaintiffs have a likelihood of success on the merits of their claims.

4. The public interest and equities favor entry of a court order granting the Plaintiffs the following described declaratory relief, as well as temporary, preliminary, and permanent injunctive relief

WHEREFORE, the Plaintiffs prayerfully request that this Court:

A. Declare that the Defendants are acting in violation of the First Amendment of the United States Constitution;

B. Declare that the Defendants are acting in violation of Article 1 § 3 of the Minnesota State Constitution;

C. Declare Minn. Stat. § 211B.11 is facially unconstitutional under the United States Constitution and the Minnesota Constitution;

D. Enjoin all of the Defendants from the enforcement of policies preventing any citizen from wearing the "Please I.D. Me" button or any "Tea Party Patriot" shirts (or hats) in polling places on November 2, 2010;

E. Order all of the Defendants to immediately provide training and instruction to all election judges, poll workers, and all other individuals under the supervision and control of the Defendants responsible for the conduct of elections within the polling places that the wearing of "Please I.D. Me" buttons or any "Tea Party Patriots" shirt or hat does not infringe upon Minn. Stat. § 211B.11, and that the wearing of the button, shirt, or hat is protected speech and association of that person under the United States and Minnesota Constitutions;

F. Award compensatory damages and punitive damages against Defendants with the exception of the Secretary of State if warranted;

G. Award Plaintiffs their reasonable attorney fees, litigation expenses, and costs as allowed under 42 U.S.C. § 1988, and other applicable laws, and grant such other relief as this Court deems just to the Plaintiffs and their attorneys.

MOHRMAN & KAARDAL, P.A.

Dated: October 28, 2010

s/Erick G. Kaardal
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33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074

Attorney for Plaintiffs

STATE OF MINNESOTA) FILED 10/29/10
)ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF SUE JEFFERS

Sue Jeffers ("Affiant"), being first duly sworn, on oath, deposes and says as follows:

1. I am a registered voter of the State of Minnesota, residing at 1720 20th Ave NW, New Brighton.

2. I am an election judge in Ramsey County, Minnesota.

3. On Tuesday, October 19th at approximately 10:30 AM, in my capacity as both an election Judge in Ramsey County and as a news talk radio host called Ramsey County Election Director Joe Mansky to make inquiries about rumors that non-partisan "Tea Party" apparel and buttons would be prohibited from the polling places on Election Day by Ramsey County. He confirmed that "Tea Party" messages of any kind, even though they are not in support of or opposition to candidates or issues on the ballot. I also inquired about the status of Election Integrity Watch's "Please ID ME/ ElectionIntegrityWatch.com" buttons that volunteer poll watchers are being asked to wear to the polls. Mr. Mansky told me that the "Please ID Me" buttons would not be allowed in the polling place. I was shocked and said, "so nobody could wear a Vikings jersey to the polls because it is pro-stadium?" Mr. Mansky replied that a Vikings jersey could be construed as political if there was a ballot

measure regarding construction of a new Vikings stadium that year.

4. Prior to my phone conversation with Mr. Mansky, I received election judge training from him. At that time he made no mention of either Tea Party apparel or Election Integrity Watch buttons being prohibited from the polling place.

5. In my conversation with Mr. Mansky, I inquired how election judges are supposed to know what apparel and buttons are allowed and which are prohibited. He asked if I would like him to send out a memo to head election judges explaining the policy. I told him that was a good idea and he said he would do so.

FURTHER YOUR AFFIANT SAYETH NOT.

Subscribed and sworn to before me
this 21st day of October, 2010

s/ Sue Jeffers
Sue Jeffers

s/ Karen Mitchell-Clark
Notary Public

NOTARY PUBLIC SEAL

STATE OF MINNESOTA) FILED 10/29/10
)ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF COLIN WILKINSON

COLIN WILKINSON ("Affiant"), being first duly sworn, on oath, deposes and says as follows:

1. I am a registered voter of the State of Minnesota, residing at 1019 FREMONT AV ST. PAUL MINNESOTA.

2. I am an election judge in Ramsey County, Minnesota.

3. In the course of attending election judge training, I witnessed the following:

> Joe Mansky Ramsey County ELECTION SUPERVISOR LED A TRAINING SESSION ON MONDAY September 27. The topic of acceptable attire the election site was covered. A question was asked if "TEA PARTY" SHIRTS AND BUTTONS WERE ACCEPTABLE or was it to be considered campaign material. Mr. Mansky said "yes, a shirt that said Tea Party would be considered campaign material" and WOULD NOT BE ALLOWED IN THE ELECTION SITE.

FURTHER YOUR AFFIANT SAYETH NOT.

Subscribed and sworn to before me
this 21st day of October, 2010

s/Colin Wilkinson
Colin Wilkinson

s/Eric Luis Negron
Notary Public

NOTARY PUBLIC SEAL

STATE OF MINNESOTA) FILED 10/29/10
)ss.
COUNTY OF HENNEPIN)

AFFIDAVIT OF DANIEL MCGRATH

Dan McGrath ("Affiant"), being first duly sworn, on oath, deposes and says as follows:

1. I am a registered voter of the State of Minnesota, residing at 3429 Snelling Avenue, Minneapolis.

2. Having been informed that Ramsey County was training election judges to disallow "Tea Party" apparel in the polling places and having heard speculation that the "Please ID ME/Election Integrity Watch" buttons worn by fraud-spotter volunteers on Election Day may be similarly prohibited, on Tuesday, October 19th at 9:27 A.M. I called the information line at the election office of Ramsey County. A woman answered. I did not get her name. I explained what I'd heard regarding the Tea Party apparel being prohibited at the polling places. The election office worker confirmed that would be Ramsey County's policy, that Tea Party apparel, buttons and the like would not be allowed in the polling places. For clarification, I asked if this could apply even though such materials convey a philosophy and do not support candidates, political parties or ballot measures. The election office worker answered in the affirmative, confirming that such materials would not be allowed. At 9:47 AM I called the Ramsey County elections office again to inquire specifically about the "Please ID Me/Election Integrity Watch" buttons. A different woman

answered my call. I did not ask for her name. I asked if the buttons would be prohibited in Ramsey County. I was put on hold for several minutes and when the woman returned, she informed me that "right now, we're considering those buttons political campaign materials and they will not be allowed in the polling places." She went on to explain that I could wear my button to the polling place and simply take it off or cover it up when I entered to vote and that I could put it right back on when I left the polling place.

FURTHER YOUR AFFIANT SAYETH NOT.

Subscribed and sworn to before me
This 21st day of October, 2010

s/Dan McGrath
Dan McGrath

s/Karen Mitchell-Clark
Notary Public

NOTARY SEAL

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dorothy Fleming, Jeff Davis, Dan McGrath, Eugene F. Delaune II, and Randy Liebo, Plaintiffs, vs. Joe Mansky in his official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her official capacity as the Elections Manager for Hennepin County, Mike Freeman in his official capacity as Hennepin County Attorney, Susan Gaertner in her official capacity as Ramsey County Attorney, and Mark Richie in his official capacity as Secretary of State, Defendants.	Court File No. 10-CV-4401 JNE/SRN **DECLARATION OF RANDY LIEBO** FILED 10/29/10

DECLARATION

I, Randy Liebo, declare and make the following statements:

1. I am an eligible and registered voter in Hennepin County, Minnesota.

2. I own and wear shirts from the "Tea Party Patriots" with slogans such as "Don't tread on me," "Liberty," We'll Remember in November," "Fiscal Responsibility, Limited Government, Free Markets" or a drawing of a shield.

3. I also will wear one of my Tea Party Patriot T-shirts on November 2, 2010, election day, in my respective polling place when I cast my vote in Hennepin County.

4. I did not expect the prohibition of these T-shirts from the polling place, and if not removed or covered, the resulting deprivation of my right to vote.

5. I believe these items are expressions of free speech or association with the group.

6. I believe there is nothing in the wearing of the shirt that endorses (or proposes the defeat of) a specific candidate or ballot question.

7. I am also familiar with Minnesota Northstar Tea Party Patriots as an organizer for that association.

8. Plaintiff Minnesota Northstar Tea Party Patriots (Northstar Patriots) is not a political party under Minn. Stat. § 200.02 which states that a "political party" means an association of individuals under whose name a candidate files for partisan office.

9. Furthermore, the Northstar Patriots does not endorse candidates for elected office and none of the associations associated with the Northstar Patriots endorse candidates for elected office.

10. There are opportunities for people to purchase Tea Party Patriot shirts or hats that reflect the values of the organization inclusive of subjects such as fiscal responsibility, constitutionally limited government and free markets.

11. The shirts (or hats) do not endorse any candidate or question on November 2, 2010.

12. There is nothing in any particular shirt or that phrase or on in any phrase or slogan that endorses, causes confusion, undue influence, or is in any other way related to a political campaign.

13. While the slogan may reflect the wearer's association with a particular group such as the Northstar Patriots, or even Election Integrity Watch, none endorse candidates or ballot questions (or the defeat of a ballot question or candidate).

14. I am an advocate of the Northstar Patriots effort.

15. I have a Tea Party Patriot shirt, I wear it, and will wear that shirt into the polling place on November 2, 2010 and in future elections.

16. I view the "Tea Party Patriots" shirt as an expression of free speech that does not support any Minnesota political campaign ballot question or candidate, and further views the "Tea Party Patriots" shirt as an expression of my association with the Minnesota Northstar Tea Party Patriots coalition to demand governmental integrity.

17. I am aware of the pronouncements of Defendant Joe Mansky prohibiting "Tea Party Patriots" shirts from Ramsey County polling places.

18. I am also aware that I can be prosecuted under Minn. Stat. § 211B.11 as it relates to any enforced prohibition of the "Tea Party Patriots" shirts in or around polling places.

19. As a result, I fear prosecution for my expression of speech and my association with the Northstar Patriots for wearing the "Tea Party Patriots" shirt.

20. Finally, I am further concerned that if I do not relinquish the display of my "Tea Party Patriots" shirt, I will be prevented from voting on November 2, 2010.

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Dated: October 29, 2010

s/Randy Liebo
Randy Liebo

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, Election Integrity Watch; Susan Jeffers, individually and as an election judge; Dorothy Fleming, Jeff Davis, Dan McGrath, Eugene F. Delaune II, and Randy Liebo, Plaintiffs, vs. Joe Mansky in his official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her official capacity as the Elections Manager for Hennepin County, Mike Freeman in his official capacity as Hennepin County Attorney, Susan Gaertner in her official capacity as Ramsey County Attorney, and Mark Richie in his official capacity as Secretary of State, Defendants.	Court File No. 10-CV-4401 JNE/SRN **DECLARATION OF DOROTHY FLEMING** FILED 10/29/10

DECLARATION

I, Dorothy Fleming, declare and make the following statements:

1. I am an eligible and registered voter in Hennepin County, Minnesota.

2. I own and will wear a button made by Election Integrity Watch that states "Please I.D. Me."

3. I also will wear the "Please I.D. Me" button on November 2, 2010, election day in my respective polling place when I cast my vote in Hennepin County.

4. I did not expect election officials or other county officials to announce the prohibition of the "Please I.D. Me" button from the polling place, and if not removed or covered I fear will result in the deprivation of my right to vote.

5. I believe wearing the button is a legitimate expression of my right to free speech and association with Election Integrity Watch.

6. I believe there is nothing wrong in the wearing of the button because it does not endorse (or propose the defeat of) a specific candidate or ballot question.

7. I am an eligible voter residing in Hennepin County and I am an advocate of the Election Integrity Watch efforts against illegal voting and other illegal campaign practices.

8. I am aware of the pronouncements of Defendant Mike Freeman, Hennepin County Attorney and my county attorney, not to allow "Please I.D. Me"

buttons in polling places—viewing them as campaign buttons.

9. I am also aware that I could be prosecuted under Minn. Stat. § 211B.11 as it relates to Mr. Freeman's pronouncement that wearing of the "Please I.D. Me" button is a violation of state law.

10. As a result, I fear prosecution for my expression of speech and association with Election Integrity Watch for wearing the button "Please I.D. Me" in the polling place.

11. I am concerned that if I do not relinquish the display of my "Please I.D. Me" button, I will be prevented from voting.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: October 29, 2010

s/Dorothy Fleming
Dorothy Fleming

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, Election Integrity Watch; Susan Jeffers, individually and as an election judge; Dorothy Fleming, Jeff Davis, Dan McGrath, Eugene F. Delaune II, and Randy Liebo, Plaintiffs, vs. Joe Mansky in his official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her official capacity as the Elections Manager for Hennepin County, Mike Freeman in his official capacity as Hennepin County Attorney, Susan Gaertner in her Official Capacity as Ramsey County Attorney, and Mark Richie in his official capacity as Secretary of State, Defendants.	Court File No. 10-CV-4401 JNE/SRN **DECLARATION OF JEFF DAVIS** FILED 10/29/10

DECLARATION

I, Jeff Davis, declare and make the following statement:

1. I am an eligible and registered voter in Minnesota and will vote in Ramsey County.

2. I own and will wear a button that states "Please I.D. Me" "Election Integrity Watch" on Election Day, November 2, 2010, in my respective polling place when I cast my vote in Ramsey County. I also intend to wear this button in future elections.

3. The "Please I.D. Me" button was a creation of Election Integrity Watch. It states "PLEASE ID ME;" that provides a telephone number "877.602.WATCH;" that provides a website address "ELECTIONINTEGRITYWATCH.COM;" and has a back ground picture of a drawn human eye similar to that found on the back of a dollar bill.

4. I did not expect the government would prohibit the "Please I.D. Me" button from the polling place.

5. I believe the "Please I.D. Me" button is an expression of my right to free speech or association with the Election Integrity Watch coalition and its member associations.

6. Because I have no intention to remove or cover-up the "Please I.D. Me" button when I arrive at my polling place, either an election judge or another poll worker will prohibit my ability to vote, therefore depriving me of that protected right.

7. I believe there is nothing in the wearing of the "Please I.D. Me" button that endorses (or proposes the defeat) a specific candidate or ballot

question and I do not believe the button qualifies as prohibited campaign materials in the polling place as defined by state law.

8. In preparation for the 2010 election, Minnesota Majority, Minnesota Voters Alliance and the Minnesota Northstar Tea Party Patriots formed a coalition referred to as "Election Integrity Watch," a concerned grass roots effort to protect election integrity.

9. As a Director of Minnesota Majority I am familiar with the two other organizations that comprise Election Integrity Watch. None of the organizations are political parties. None of the organizations endorse candidates.

10. Minnesota Majority is not a political organization.

11. Minnesota Majority does not endorse candidates. Furthermore, it takes no position to promote or to defeat ballot questions.

12. The "Please ID Me" button is a creation of the coalition Election Integrity Watch.

13. Because the coalition Election Integrity Watch is concerned with election integrity, it has developed a program for individuals, if they so desire, to act as poll watchers on Election Day, November 2, 2010. They have been trained not to go near voters who are voting, to talk to voters, or to otherwise to intervene with the voting process of an individual in any way. See attached Exhibits.

14. Furthermore, they have been instructed to remain outside polling places unless when voting

themselves or if otherwise authorized to be in the polling place.

15. They have been instructed to observe the election process only.

16. Election Integrity Watch has disseminated its button and requested its separate organizational members and supporters to wear the "Please I.D. Me" button on the forthcoming Election Day, November 2, 2010, in their respective polling places as they prepare to vote even if not acting as a poll watcher.

17. There is no ballot question for Minnesota voters to vote upon regarding voter identification or other voter identification issues.

18. There is no political campaign related to voter identification.

19. There is nothing on the button that indicates the support of or encourages the vote for a particular candidate for elected office.

20. Plaintiff Minnesota Majority has engaged in scrutinizing election processes since prior to the 2008 election.

21. Inclusive of its studies of election processes, Minnesota Majority has examined public records regarding specific issues such as non-eligible voters—non-citizens or non-eligible felons for instance—who may have voted during the election of 2008.

22. In 2009 and most recently in 2010, the Secretary of State, Hennepin County, and Ramsey County officials have resisted attempts by Minnesota Majority to protest alleged improper procedures by the

Secretary of State, or to obtain public records to examine and produce studies relating to for instance, non-citizens.

23. Most recently, Minnesota Majority made efforts to obtain the records of the Minnesota Department of Public Safety through Minnesota Government Data Practices Act requests and sought assistance through the Secretary of State's Office for the retrieval of what I deem as public information. All efforts have been unsuccessful and Minnesota Majority is contemplating legal action—as allowed under the Data Practices Act—those particular documents.

24. The Secretary of State, after the filing of the Minnesota Majority's Petition before the Minnesota Supreme in 2009 regarding inaccuracies relating to the Statewide Voter Registration System, admitted that more ballots were cast than voters counted for in the thousands, and as of this date the Secretary of State has not publicly pronounced a full reconciliation of those discrepancies.

25. On October 26, 2010, Hennepin County Attorney Mike Freeman announced that he would prohibit buttons such as "Please ID Me" from the polling place. He stated that the button was a campaign button and if worn in the polling place it would be against state law.

26. Hennepin County Election Manager Rachel Smith has stated to me during an inquiry after the Freeman pronouncement that she considers her office obligated to follow the dictates of the Hennepin County Attorney's pronouncement on the prohibition

of "Please I.D. Me" buttons in Hennepin County election polling places on November 2, 2010.

27. I am also aware that they can be prosecuted under Minn. Stat. § 21 lB.11 as it relates to Mr. Freeman's pronouncement that wearing of the "Please I.D. Me" button is a violation of state law.

28. As a result, I am fearful that I could be prosecuted for wearing the "Please ID Me" button as an expression of speech and my association with Election Integrity Watch.

29. I am concerned that if I do not relinquish the display of my "Please ID Me" button either through removing it or covering it I will be prevented from voting.

30. Finally, I am aware of the Common Cause filing of it Office of Administrative Hearings complaint against Minnesota Majority and Minnesota Voters Alliance—both part of Election Integrity Watch. In the Common Cause complaint, the wearing of the "Please I.D. Me" button in the polling place is also alleged to be illegal.

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Dated: October 29, 2010

s/ Jeff Davis
Jeff Davis

FILED 10/29/10

VIOLATIONS OF CHAPTER 211B

Violations of Chapter 211B may entail criminal penalties. A conviction on criminal charges for violating its provisions may forfeit a winner's nomination or election. In addition to these penalties, the violator, if that individual has won the election, is prohibited from being appointed to the office sought during the term of the office with respect to which the election was held.

M.S. 211B.32 provides that a complaint alleging a violation of Chapter 211A or 211B must be filed with the Office of Administrative Hearings. The complaint must be finally disposed of by the Office of Administrative Hearings before the alleged violation may be prosecuted by a county attorney.

Penalties. In its disposition of the complaint, the Office of Administrative Hearings may impose a civil penalty of up to $5,000 for any violation of Chapter 211A or 211B. In addition, the complaint may be referred to the appropriate county attorney for criminal prosecution as a misdemeanor or felony, however the law provides.

Furthermore, the person convicted may forfeit the nomination or office. *M.S. 211B.17, subd. 1.* The convicted person may not be appointed to fill a vacancy in the office for which election was sought and is not qualified to fill a vacancy in any office for which the legislature may establish qualifications under *Minn. Const. art XII.3. M.S. 211B.17.*

The prohibition on holding office does not limit the ability of each house of the legislature to judge the election returns and eligibility of its own members.

Circumstances where nomination or election not forfeited. *M.S. 211B.17, subd. 2* sets forth certain situations in which the nomination or election of the candidate shall not be set aside as a penalty for violating Chapter 211B.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, Election Integrity Watch; Susan Jeffers, individually and as an election judge; Dorothy Fleming, Jeff Davis, Dan McGrath, Eugene F. Delaune II, and Randy Liebo,

Plaintiffs,

vs.

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County, Rachel M. Smith, in her official capacity as the Elections Manager for Hennepin County, Mike Freeman in his official capacity as Hennepin County Attorney, Susan Gaertner in her official capacity as Ramsey County Attorney, and Mark Richie in his official capacity as Secretary of State,

Defendants.

Court File No.
10-CV-4401
JNE/SRN

AFFIDAVIT OF JOSEPH MANSKY

FILED 11/01/10

I, Joseph Mansky, after being sworn upon oath state as follows:

1. I am currently employed as the Elections Manager for Ramsey County. I have been in my current position since 2002.

2. I have instructed election judges who work for Ramsey County not to wear any shirt, hat, button, badge or insignia while they are working as an Election Judge to ensure that the voters do not have the impression that Ramsey County supports any political position or candidate on the ballot.

3. I have informed election judges who work for Ramsey County to ask individuals who are in the polling place or within 100 feet of the polling place to cover any item of clothing or button which is a political shirt, hat, button, badge or insignia.

4. If an individual within a polling place or within 100 feet of the polling place brings to the attention of an election judge that someone is wearing a political shirt, hat, button, badge or insignia, the Election Judges have been instructed to request the individual to cover the political shirt, hat, button, badge or insignia.

5. All election judges have been informed that they are not to turn away any individual from voting who is wearing a political shirt, hat, button, badge or insignia if the individual refuses to cover up the political shirt, hat, button, badge or insignia.

6. If an individual refuses to cover up the political shirt, hat, button, badge or insignia that they are wearing, election judges have been instructed to forward the name, address and information concerning what the individual was wearing to my attention for possible referral to the Minnesota Office of Administrative Hearings.

7. Election Judges have been informed that they are only to call local law enforcement officials to restore order in the polling place in the event that someone in the polling place has become unruly and disruptive to the point that they are interfering with the ability of other individuals being able to vote.

8. Attached as Exhibit A is the memo from my office that will be forwarded to all Election Judges.

9. I drafted Exhibit A in response to questions that I received during election judge training primarily concerning Tea Party Shirts and the Election Integrity Watch buttons. I have reviewed the affidavit of Ms. Sue Jeffers in which she describes a conversation between us in which I indicated that if there was an initiative concerning the building of a sports stadium for the Minnesota Vikings that I would instruct election judges to ask individuals wearing Minnesota Vikings paraphernalia to cover up the Vikings paraphernalia that they were wearing. I may have used other examples in my conversations with individuals during election judge training.

10. The intention of the policy is to maximize voter participation and minimize, if not eliminate all, disruption of the polling place while having a content neutral policy.

11. On average, an individual typically spends less than 10 minutes in the polling place waiting to vote and voting.

12. I am unaware of prior complaints concerning actions of election judges in Ramsey County in asking individuals to cover up a political shirt, hat, button, badge or insignia.

13. I am unaware of Ramsey County being served with an Office of Administrative Hearings Complaint concerning our proposed policy.

14. I have not been personally served with an Office of Administrative Hearings Complaint concerning our proposed policy.

15. I understand from the Office of the Ramsey County Attorney that Plaintiffs in the above action seek to act as "poll watchers." There is no provision under Minnesota law to allow individuals to serve as "poll watchers." Minn. Stat. § 204C.06 is clear that "no one except an election official or an individual who is waiting to register or to vote or an individual who is conducting exit polling shall stand within 100 feet of the building in which a polling place is located."

16. Minn. Stat. § 204C.07 provides that major political parties in a partisan election may designate one challenger for each precinct from each major political party to serve as a challenger. Election judges, pursuant to Minnesota law, shall permit challengers to be present in the polling place during the hours of voting and to remain there until the votes are counted and the results declared.

17. I am unaware of any complaint concerning the designation of challengers under Minn. Stat. § 204C.07.

18. In reviewing the materials submitted by plaintiffs I understand that they contend that requesting voter identification of potential voters is not a political issue tied to a political candidate or political party on the November 2, 2010 ballot. I do not believe that the position advocated by the plaintiffs is

accurate and it is reasonable for election officials to conclude otherwise.

19. Representative Tom Emmer is the Republican Party nominee for governor and is on the ballot on November 2. One of Candidate Emmer's campaign issues is the enactment of a voter ID law. In fact, in the 2009-2010 legislative session, Mr. Emmer was the chief House author of HF 57, a bill to require photo identification before receiving a ballot. HF 57 was the first bill Mr. Emmer introduced during the past legislative session. Mr. Emmer is clearly associated with this political issue. HF 57 has 26 Republican authors, fully 55% of the membership of the House Republican caucus. There are no DFL authors on this bill.

20. The February 9, 2009 vote in the House State and Local Government Operations committee on HF 57 was 8 in favor, 11 against. 7 of the 8 votes in favor were cast by Republican members of the committee, including Rep Emmer. All 11 votes in opposition were cast by DFL members of the committee.

21. Gubernatorial Candidate Emmer's website lists "Elections" as one of the principal issues in his campaign. The information on Gubernatorial Candidate Emmer's website states in part:

> Photo identification is the number-one election integrity reform. Lack of a photo identification requirement erodes public confidence in our elections. In its absence, individual voters are left to question the value of their votes among others that may be fraudulent.

. . .

> Voter identification and verification laws protect the integrity of our elections and the foundation of our representative form of government. In addition to supporting a photo ID requirement, I will also work to eliminate vouching and reform absentee voting to not only guarantee integrity but to also ensure our men and women serving overseas—those protecting our electoral freedom in the first place—are able to participate.

22. Representative Dan Severson is the Republican Party nominee for secretary of state and is on the ballot on November 2. His principal campaign issue for that office is the enactment of a law to require photo identification before receiving a ballot. Rep. Severson is clearly associated with this political issue. Mr. Severson was in fact a co-author of Rep Emmer's photo ID bill, HF 57.

23. Secretary of State Candidate Severson's website lists Voter ID as the top issue of his campaign. The information on Secretary of State Candidate Severson's website states in part:

> First and most importantly implement Photo ID.
>
> . . . Photo ID modernizes and streamlines the process, in the long term costing less, and provides us all the confidence to know that our votes are counted fairly without being diluted by people who may try to game the system. With Minnesota's lax election system, it

> is very difficult to determine the validity of an election after the fact and nearly impossible to identify who is responsible even when errors or abuse are detected. The solution is to verify first with photo ID.

24. In objectively looking at the above information, I believe that it is reasonable to conclude that photo ID is nothing more than a surrogate for the political positions of the Republican and DFL parties, for and against, and the campaign positions of two candidates on the ballot on November 2, Mr. Emmer and Mr. Severson.

25. The issue of photo identification for voting is a highly charged political proposal and is a matter of considerable political controversy, not just in Minnesota but across the country. It was the subject of party-line votes in the Georgia and Indiana legislatures and considerable litigation in both states, reaching the US Supreme Court (Georgia) and the state supreme court (Indiana) in the process.

26. The following information was taken from The Ohio State University Moritz Law School web site:

> "Unsurprisingly, Indiana's photo identification law passed on a strict party-line vote; not a single Republican opposed the measure, not a single Democrat supported it, and the measure was signed by a Republican governor. The amicus brief of historians and other scholars provides an interesting national perspective on the partisan divide,

> noting that Indiana's law was one of at least ten photo identification bills introduced by Republicans in state legislatures between 2005 and 2007 and that if the legislative votes for all these bills is combined, 95.3 percent of the 1,222 Republicans voting supported the bills while just 2.1 percent of the 796 Democrats voting supported the bills. A partisan divide indeed."

27. In reviewing the materials submitted by plaintiffs I understand that they contend that the "Tea Party" is not affiliated with any political candidate or political party on the November 2, 2010 ballot. I do not believe that the position advocated by the plaintiffs is accurate and that it is reasonable for election officials to conclude otherwise.

28. There is a Tea Party Caucus in the United States Congress. The Tea Party Caucus is chaired by Representative Michele Bachmann, from Stillwater. As of August 2, all 49 members of the caucus were Republicans. Representative Bachman has raised and contributed funds to Tea Party congressional candidates throughout the United States.

29. 2008 Republican Vice-Presidential Candidate Sarah Palin on October 19 began a 19 state tour across the country to meet with Tea Party groups to advocate for Tea Party members to get out the vote to unseat certain political candidates and to vote for certain candidates. Mrs. Palin has suggested to numerous Tea Party groups on several occasions that she is interested in running for the office of the President in 2012.

Dated: November 1, 2010 s/ Joseph Mansky
Joseph Mansky

Subscribed and sworn to before me
this 1st day of Nov, 2010

s/ DeMaree Braun
Notary Public

NOTARY PUBLIC SEAL

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Court File No. 10-CV-4401 JNE/SRN

Minnesota Majority, Minnesota Voters Alliance, Minnesota North Star Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dorothy Fleming, Jeff Davis, Dan McGrath and Andy Cilek, Plaintiffs, vs. Joe Mansky in his individual and official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her individual and official capacity as the Elections Manager for Hennepin County, Mike Freeman in his individual and official capacity as Hennepin County Attorney, Susan Gaertner in her individual and official capacity as Ramsey County Attorney, and Mark Richie in his individual and official capacity as Secretary of State, Defendants.	**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** **JURY TRIAL DEMANDED** FILED 11/18/10

The Plaintiffs state for their First Amended Complaint as follows:

INTRODUCTION

1. This is an action for declaratory and injunctive relief against various state officials who prevented eligible voters from wearing buttons or clothing that did not endorse candidates or ballot questions in polling places on election day. The prohibition and threat of prosecution by state officials violated the First Amendment protections of free speech, association and the right to vote under the United States Constitution; protections of equal protection and due process under the Fourteenth Amendment; as well as the corresponding and applicable provisions of the Minnesota Constitution. Inclusive of the constitutional violations is the Plaintiffs' contention that the governing statute under which the state officials assert their authority—Minn. Stat. § 211B.11—is unconstitutional on its face and as applied.

2. During the November 2, 2010, state officials did invoke policies under Minn. Stat. § 211B.11 that resulted in eligible voters not wearing certain buttons and clothing for fear of prosecution. State officials did discriminate in the inconsistent enforcement of its announced policies. State officials did threaten prosecution. State officials did prevent at least one eligible voter from voting under their announced policies.

3. Declaratory and injunctive relief is necessary to allow eligible voters to peacefully exercise their right to vote within the polling place on election day while exercising their constitutionally

protected rights under the United States and Minnesota Constitutions.

JURISDICTION

4. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(1)-(4) and 42 U.S.C. §§ 1983, 1985(2), (3) and § 1988 (civil rights statutes) and the First Amendment of the United States Constitution.

5. This Court is authorized to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, Federal Rules of Civil Procedure 57 and 65, and has general legal and equitable powers.

6. Venue is proper in this Court under 28 U.S.C. § 1391. Plaintiffs further invoke the pendent jurisdiction of this Court to consider claims arising under state law.

PARTIES

Plaintiffs

7. Plaintiff Minnesota Majority is a Minnesota 501(c)(4) nonprofit organization with members formed in the interest of transparency in government, protecting identified values as they interrelate with political issues, including oversight, investigation, and reform concerning election and voter or voter registration irregularities. It is an association of members. Minnesota Majority does not endorse candidates seeking elected or appointed offices.

8. Plaintiff Minnesota Voter Alliance is a Minnesota 501(c)(4) nonprofit organization with members formed with the primary purpose of empowering the electorate, with interests inclusive of the integrity of the election process. It is a non-

partisan, and is not affiliated with any political party or organization. Minnesota Voters Alliance does not endorse candidates seeking elected or appointed offices.

9. Plaintiff North Star Tea Party Patriots is a Minnesota 501(c)(4) nonprofit member organization. It is not a political party. It is a coalition of local associations in Minnesota with a mission to attract, educate, organize, and mobilize citizens to secure public policies consistent with values inclusive of fiscal responsibility, constitutionally limited government and free markets. North Star Tea Party Patriots does not endorse candidates seeking elected or appointed offices.

10. Plaintiff Election Integrity Watch is the coalition of the Plaintiffs Minnesota Majority, Minnesota Voters Alliance, and the Minnesota North Star Tea Party Patriots.

11. Under Minn. Stat. § 200.02, a "political party" means an association of individuals under whose name a candidate files for partisan office. Under this definition, Election Integrity Watch, Minnesota Majority, Minnesota Voters Alliance, and Minnesota North Star Tea Party Patriots are not political parties.

12. Plaintiff Susan Jeffers is an eligible and registered voter in Minnesota, residing at 1720 20th Avenue NW, New Brighton. Ms. Jeffers is an election judge in Ramsey County, Minnesota.

13. Plaintiff Jeff Davis is an eligible and registered voter in Ramsey County, Minnesota.

14. Plaintiff Dorothy Fleming is an eligible and registered voter in Hennepin County, Minnesota.

15. Plaintiff Dan McGrath is an eligible and registered voter in Hennepin County, Minnesota.

16. Plaintiff Andy Cilek is an eligible and registered voter in Hennepin County, Minnesota.

Defendants

17. Defendant Joe Mansky is the Elections Manager for Ramsey County, Minnesota. Mr. Mansky is responsible for the conduct of elections in Ramsey County such as the enforcement of statutory prohibitions on electioneering, including but limited to identifying eligible and ineligible voters, the conduct within polling places as it relates to campaign materials and the training and oversight of Ramsey County election judges.

18. Defendant Rachel M. Smith is the Elections Manager for Hennepin County, Minnesota. Ms. Smith is responsible for the conduct of elections in Hennepin County such as the enforcement of statutory prohibitions on electioneering, including but limited to identifying eligible and ineligible voters, the conduct within polling places as it relates to campaign materials and the training and oversight of Hennepin County election judges.

19. Defendant Mike Freeman is the Hennepin County Attorney. He is responsible for preserving the freedom of speech of citizens and for the enforcement of laws through his office within the County including petty misdemeanors. Mr. Freeman individually and through his office is also responsible for the constitutional enforcement of statutory prohibitions on electioneering.

20. Defendant Susan Gaertner is the Ramsey County Attorney. She is responsible for

preserving the freedom of speech of citizens and for the enforcement of laws through her office within the County including petty misdemeanors. Ms. Gaertner individually and through her office is also responsible for the constitutional enforcement of statutory prohibitions on electioneering.

21. Defendant Mark Richie is the Minnesota Secretary of State. As Secretary of State, Mr. Richie is the statewide election officer responsible for the policies relating to the conduct of elections within the State. Mr. Richie directly communicates with County Election Managers, or their equivalent officials, on election matters inclusive of the conduct within polling places as it relates to election judges or other poll workers.

22. At all times relevant to the allegations of this Complaint, and in all actions described, the defendants acted under color of law and under the authority bestowed upon them as county or state officials.

Constitutional and Statute Provisions at Issue

23. The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

24. The Fourteenth Amendment, Section 1 of the United States Constitution states that the State shall not "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

25. Article 1, § 2 of the Minnesota Constitution states that "[n]o member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof . . ." which is protective of a person's right to vote and to equal protection of the laws.

26. Article 1, § 3 of the Minnesota Constitution states that "all persons may freely speak, write, and publish their sentiments on all subjects . . ." which is protective of a person's right to free speech.

27. Article 1, § 7 of the Minnesota Constitution protects a person's right to due process under the law.

28. Minnesota Statute § 211B.11, subd. 1 states that:

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place . . . . on primary or election day to vote for or refrain from voting for a candidate or a ballot question . . . A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day
>
> * * *
>
> Subd. 4. . . . Violation of this section is a petty misdemeanor.

FACTS

Election Integrity Watch "Please I.D. Me" buttons are not political and are not associated with any Minnesota political election campaign.

29. In preparation for the 2010 election, Plaintiffs Minnesota Majority, Minnesota Voters Alliance and the Minnesota North Star Tea Party Patriots formed a coalition referred to as "Election Integrity Watch."

30. Election Integrity Watch is not a political party under Minn. Stat. § 200.02 which states that a "political party" means an association of individuals under whose name a candidate files for partisan office.

31. Election Integrity Watch is a concerned grass roots effort to protect election integrity.

32. Election Integrity Watch instructed individuals to observe the election process only and not to interfere with any person's attempt to register to vote, or vote on election day, November 2, 2010.

33. The Election Integrity Watch created a button that states "PLEASE I.D. ME." (See Exhibit A).

34. The Election Integrity Watch button also provides a telephone number —"877.602.WATCH."

35. The Election Integrity Watch button also provides a website "ELECTIONINTEGRITYWATCH.COM."

36. The Election Integrity Watch also has as a background for the previously referenced wording and number, a design that appears as a human eye—similar to that found on the back of the U.S. dollar bill.

37. Election Integrity Watch has disseminated its button and instructed its separate organizational members and supporters to wear the "Please I.D. Me" button on election day, November 2, 2010, in their respective polling places.

38. There is no ballot question for Minnesota voters to vote upon regarding voter identification or other voter identification issues.

39. There is no political campaign related to voter identification.

40. Election Integrity Watch does not, has not, and did not encourage others to vote for or against a person seeking elective office in the November 2010 election, nor did it nominate, or called for the support of any political candidate as a coalition.

Minnesota North Star Tea Party Patriots offered shirts and hats that are not political endorsements of any candidate and are not associated with any Minnesota political election campaign.

41. Plaintiff Minnesota North Star Tea Party Patriots (North Star Patriots) is not a political party under Minn. Stat. § 200.02 which states that a "political party" means an association of individuals under whose name a candidate files for partisan office.

42. The North Star Patriots does not endorse candidates for elected office.

43. None of the associations associated with the North Star Patriots endorse candidates for elected office.

44. North Star Patriots did not endorse, promote, or encourage others to vote for or against a

particular candidate for elected office on November 2, 2010.

45. Plaintiff North Star Patriots offers to the public shirts and hats that reflect the values of the organization inclusive of subjects such as fiscal responsibility, constitutionally limited government and free markets.

46. The North Star Patriots shirts offered have statements, phrases, or slogans such as "Don't tread on me," "Liberty," We'll Remember in November," "Fiscal Responsibility, Limited Government, Free Markets" or a drawing of a shield.

47. Each shirt or hat includes the logo "Tea Party Patriots." (See Exhibit B).

48. There is nothing in any particular shirt or that phrase or slogan that endorses, causes confusion, undue influence, or is in any other way related to a political campaign in the November 2010 election.

49. Each slogan is reflective of the wearer's association with a particular group that does not endorse candidates or ballot questions.

Ramsey County Election Manager, Joe Manksy, determined and instructed that Election Integrity Watch "Please I.D. Me" buttons and "Tea Party" messages of any kind would not be allowed in polling places.

50. Plaintiff Sue Jeffers is a Ramsey County Election Judge.

51. Ms. Jeffers contacted Joe Mansky, Ramsey County Election Director regarding certain rumors relating to Election Integrity Watch "Please

I.D. Me" buttons and North Star Patriots shirts on October 19, 2010.

52. Mr. Mansky stated to Ms. Jeffers that Election Integrity Watch "Please I.D. Me" buttons would be prohibited in Ramsey County polling places.

53. Mr. Mansky stated to Ms. Jeffers that "Tea Party Patriots" messages of any kind—even if they did not support or oppose a candidate, or an issue on the ballot—worn by any person, would be prohibited in Ramsey County polling place.

54. Ms. Jeffers was "shocked" at the prohibition Mr. Mansky promulgated regarding the "Please I.D. Me" buttons and "Tea Party Patriots" shirts.

55. As an election judge, Ms. Jeffers will be responsible for enforcing the Ramsey County policy of prohibiting a person in the polling place that is wearing either a "Please I.D. Me" button or a "Tea Party Patriots" shirt.

56. As an election judge, Ms. Jeffers disagrees with Mr. Mansky's policy decision of prohibiting people who are wearing "Please I.D. Me" buttons or "Tea Party Patriots" shirts from the polling place as contrary to voting rights, free speech and association principles.

Consistent with Mansky's specific comments to Ms. Jeffers regarding the specific button of "Election Integrity Watch" and clothing of Tea Party Patriots, he instructed election judges to have individuals cover "political" clothing or buttons and if they did not that person may be subject to possible prosecution.

57. Mr. Mansky informed election judges, prior to November 2, 2010, that they were to ask individuals found in the polling place or within 100 feet the polling place to cover any item of clothing or button that is a "political shirt, hat, button, badge or insignia" particularly the "Please I.D. Me" button or Tea Party Patriots clothing.

58. Mr. Mansky further instructed Ramsey County election judges that if the individual did not cover up the "political shirt, hat, button, badge or insignia" the election judges were to take the person's name, address, and information for possible referral for prosecution, particularly those wearing "Please I.D. Me" buttons or Tea Party Patriots clothing.

59. Mr. Mansky stated no person would be turned away from voting even if that person failed to cover up his or her "political shirt, hat, button, badge or insignia" particularly those wearing "Please I.D. Me" buttons or Tea Party Patriots clothing.

Hennepin County adopted similar procedures as the Ramsey County Elections Manager and had that information conveyed to its county election judges that they prohibit the wearing of "Please I.D. Me" buttons in polling places as directed by County Attorney Mike Freeman.

60. Upon information and belief, Hennepin County Election Manager Rachel Smith adopted the procedures as delineated by Mr. Mansky and informed the Hennepin County Election judges of the procedures inclusive of requesting a person to cover up any "political shirt, hat, button, badge or insignia" if that person is found within 100 feet of the polling place or in the polling place and if not covered to

obtain that person's name, address, and other information for possible prosecution.

Hennepin County officials, such as County Attorney Mike Freeman, in anticipation of the November 2010 election considered the prohibition and warned of prosecution for wearing "Please I.D. Me" buttons in polling places.

61. Prior to the actions of Hennepin County's adoption of Ramsey County procedures regarding "political shirt, hat, button, badge or insignia" for the November 2, 2010 election, Hennepin County Attorney Mike Freeman also publicly stated that poll watchers wearing buttons asking for their I.D. (identification) "won't be allow[ed] in polling stations." Mr. Freeman equated the Election Integrity Watch "Please I.D. Me." Buttons as campaign buttons stating, "You can't wear campaign buttons in a polling place, state law says you can't."

62. Hennepin County Election Manager Rachel Smith has stated that she considers her office obligated to follow the dictates of the Hennepin County Attorney's pronouncement on the prohibition of "Please I.D. Me" buttons in Hennepin County election polling places on November 2, 2010.

The Secretary of State as Minnesota's chief election officer adopted similar procedures as the Ramsey County Elections Manager and had that information conveyed to all other Minnesota county election managers.

63. Upon information and belief, the Secretary of State adopted similar procedures as outlined by the Ramsey County Elections Manager,

Mr. Mansky, and conveyed that information through other County Election Managers to their respective election judges.

64. Upon information and belief, the Secretary of State Mark Richie, as Minnesota's chief election officer responsible for the integrity and conduct of elections throughout the state, is the final arbiter of instructions and directions provided to election managers, or their equivalent officials, regarding the interpretation and application of elections laws within polling places.

65. Upon information and belief, the Secretary of State endorses and will uphold the decision of county election managers to prohibit individuals from wearing "Please I.D. Me" buttons or "Tea Party" shirts as previously identified in this Complaint.

66. The stated policy adopted by each defendant reflected the threat or imminent commencement of prosecution for wearing a "Please I.D. Me" button or Tea Party Patriot clothing.

Election Judges did not consistently enforce the stated defendants' policies and experienced no reported disturbance or incident relating to a person wearing either a "Please I.D. Me" button or Tea Party Patriot clothing.

67. On November 2, 2010 within Hennepin County, in places serving as a polling place, some election judges allowed individuals to wear the message of the Election Integrity Watch—"Please I.D. Me." No election judge stopped or questioned the wearing of the button in those polling places. No incident resulted or disturbance of any kind to other

voters in the polling place occurred because of the wearing of the button.

68. The Sierra Club does endorse political candidates seeking elective office. The Sierra Club did endorse candidates that appeared on the November 2, 2010 election ballot.

69. On November 2, 2010, election judges did allow individuals wearing a Sierra Club button to vote without requesting that person or persons to cover up the button as a "political shirt, hat, button, badge or insignia" within 100 feet of the polling place or in the polling place, and did not obtain that person's name, address, and other information for possible prosecution.

70. Minnesota Common Cause is a non-profit corporation that is dedicated to improving the way state government operates. It supports and lobbys for legislation for the reform of the election process.

71. On November 2, 2010, eligible voters wore Common Cause buttons into the polling place. Election judges did not require the eligible voters to cover or remove the Common Cause buttons before voting.

72. On November 2, 2010, eligible voters associated with Election Integrity Watch and Minnesota Tea Party Patriots desired to wear either a "Please I.D. Me" button or Tea Party Patriot clothing, but knowing the stated policy of county and state officials regarding the wearing of such non-political items of possible prosecution, chose not to wear their respective desired "Please I.D. Me" button or Tea Party Patriot clothing for fear of prosecution.

73. On November 2, 2010, after an eligible voter entered a polling place wearing a Tea Party Patriot shirt, registered to vote, without incident or warning to cover the shirt, started to complete his ballot. During the voting process, before his ballot was completed, an election judge interrupted the voter and requested him to cover his shirt and then warned him that if he did not he could be subject to prosecution.

74. On November 2, 2010, Plaintiff Andy Cilek entered a polling place in Hennepin County, wearing a "Please I.D. Me" button and a Tea Party Patriot shirt. At the registration table, the election judges refused to allow Mr. Cilek to vote because he was wearing a "Please I.D. Me" button and a Tea Party Patriot shirt. Mr. Cilek was told he could not vote unless he removed the button and shirt.

75. Later, Plaintiff Andy Cilek returned a second time, attempted to register to vote, but again the election judges refused to allow Mr. Cilek to vote because he wore a "Please I.D. Me" button and a Tea Party Patriot shirt.

Plaintiff Jeff Davis feared prosecution for expressing his rights of freedom of speech and association for wearing a non-campaign button on election day and did not wear the button while voting.

76. Plaintiff Jeff Davis is an eligible voter residing in Ramsey County and is an advocate of and is associated with the Election Integrity Watch effort. He has a "Please I.D. Me" button, and planned to wear the button into the polling place on November 2, 2010.

77. On November 2, 2010, knowing the stated policy of county and state officials regarding the wearing of the "Please I.D. Me" button and possible prosecution, chose not to wear it for fear of imminent prosecution by Ramsey County officials.

78. Mr. Davis views the "Please I.D. Me" button as an expression of free speech and his association with the grass roots coalition of Election Integrity Watch.

Plaintiff Jeff Davis further fears prosecution for expressing his rights of freedom of speech and association for wearing a non-campaign shirt on election day.

79. Plaintiff Jeff Davis is an eligible voter residing in Ramsey County. He is an advocate of the North Star Patriots effort. He has a Tea Party Patriots shirt and planned on wearing it into the polling place on November 2, 2010.

80. Mr. Davis views the "Tea Party Patriots" shirt as an expression of free speech that does not support any Minnesota political campaign ballot question or candidate.

81. Mr. Davis further views the "Tea Party Patriots" shirt as an expression of his association with the Minnesota North Star Tea Party Patriots coalition to demand governmental integrity.

82. On November 2, 2010, knowing the stated policy of county and state officials regarding the wearing of the "Please I.D. Me" button and possible prosecution, chose not to wear it for fear of prosecution by county officials.

Plaintiff Dan McGrath fears prosecution for expressing his right of freedom of speech and association for wearing a non-political campaign button on election day.

83. Plaintiff Dan McGrath voted on November 2, 2010. He wore a "Please I.D. Me" button.

84. An election judge asked Mr. McGrath to cover the button and he refused. The election judge obtained his name and address from the registration roster.

85. Mr. McGrath view the "Please I.D. Me" button as an expression of free speech that does not support any Minnesota political campaign ballot question or candidate.

86. Mr. McGrath further views the "Please I.D. Me" button as an expression of his association with the grass roots coalition of Election Integrity Watch.

87. Mr. McGrath was aware of the pronouncements of Defendants Ramsey County Election Manager Joe Mansky, and the adoption of that policy by Hennepin County Attorney not to allow "Please I.D. Me" buttons in polling places—viewing them as campaign political buttons.

88. Mr. McGrath was also aware that he can be prosecuted under Minn. Stat. § 211B.11 as it relates to the adopted policy of Hennepin County that wearing of the "Please I.D. Me" button is a violation of state law. As a result, he does fear prosecution for his expression of speech and association with Election Integrity Watch for wearing the button "Please I.D. Me."

Plaintiff Dorothy Fleming was not stopped by election judges nor told to cover or remove her "Please I.D. Me" button.

89. Plaintiff Dorothy Fleming is an eligible voter residing in Hennepin County and is an advocate of the Election Integrity Watch effort. She has a "Please I.D. Me" button, planned on wearing it, and did wear the button into the polling place on November 2, 2010.

90. Ms. Fleming views the "Please I.D. Me" button as an expression of free speech that does not support any Minnesota political campaign ballot question or candidate.

91. Ms. Fleming further views the "Please I.D. Me" button as an expression of their association with the grass roots coalition of Election Integrity Watch.

92. Ms. Fleming was aware of the pronouncements of adoption by Hennepin County of the Ramsey County's policy regarding a person wearing a "Please I.D. Me" button into the polling place—viewing them as campa[illegible] buttons.

93. Ms. Fleming was also aware that she could be prosecuted under Minn. Stat. § 211B.11 and that if she did not cover or remove the button, her name would be taken, and address given to County officials for possible prosecution. As a result, she did fear prosecution for her expression of speech and her association with Election Integrity Watch for wearing the button "Please I.D. Me."

94. Ms. Fleming was not stopped by an election judge in her polling place on November 2, 2010.

95. Ms. Fleming voted on November 2, 2010.

96. No delay occurred in the voting process, nor did any disturbance occur as she wore her "Please I.D. Me." button, signed in to vote, and ultimately voted.

COUNT I

Violation of the First Amendment of the United States Constitution and Threats to the Plaintiffs' Rights of Freedom of Speech, Association, and the Right to Vote.

97. The Plaintiffs adopt and incorporate by reference paragraphs 1 through 96 as if fully stated.

98. The First Amendment of the United States Constitution guarantees individuals the right to free speech, association, and the right to vote.

99. The Minnesota Constitution also protects a person's right to free speech and association, and the right to vote.

100. The Defendants either intentionally, recklessly, or with callous indifference to the federally protected rights of the Plaintiffs have threatened, silenced, or chilled their rights to freedom of speech and association by the improper adoption of policies prohibiting the wearing of non-campaign "Please I.D. Me" buttons of the Election Integrity Watch, or shirts (or hats) expressing certain slogans, phrases, or statements offered by the Minnesota North Star Tea Party Patriots.

101. Neither the "Please I.D. Me" buttons nor the "Tea Party Patriots" shirts attempt to persuade or influence voters to vote for or against any particular

candidate, ballot question, or political part in the November 2, 2010 election.

102. The Defendants' policies caused irreparable harm to the federal and state protected rights of the Plaintiffs' freedom of speech, association and the right to vote in the attempt to harass, threaten, silence, and chill these constitutional rights by directing election judges, poll workers, or others responsible for the conduct of elections and voters in polling places to interfere with the Plaintiffs' presence in or around polling places.

103. Furthermore, the imminent threat of prosecution, as a policy endorsed and adopted by the Defendants, caused certain Plaintiffs not to wear either their "Please I.D. Me" button or Tea Party Patriots clothing or both, thereby chilling their protected right of speech and association.

104. The Defendants have further failed to properly educate, train, and instruct election judges, poll workers, or others responsible for the conduct of elections and voters in polling places in the proper enforcement of election laws, namely Minn. Stat. § 211B.11, in a manner to avoid the threatened intentional, reckless, or callous indifference to the Plaintiffs' federally protected rights of freedom of speech and association, and the right to vote.

105. Further, the enforcement of the Defendants' directives threatened and did deprive the Plaintiff Andy Cilek's right to vote without due process of law for over five hours.

106. An actual live controversy exists between the Plaintiffs and the Defendants in which the parties have genuine and opposing interests that

are direct and substantial and of which a judicial determination will be final and conclusive.

107. Plaintiffs request this Court to issue declaratory and injunctive relief under 42 U.S.C. § 1983 to cease and prevent the Defendants' conduct of intentional, reckless, and oppressive disregard of Plaintiffs' First Amendment rights, and further award appropriate monetary damages against the Defendants, with the exception of the Secretary of State, inclusive of costs, attorney fees, and any other relief as this Court deems justified.

COUNT II

Due Process Claims against the Defendants for violating the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Minnesota Constitution.

108. Plaintiffs adopt and incorporate by reference paragraphs 1 through 107 as if fully stated.

109. Plaintiffs have a Fourteenth Amendment right to Due Process of law before the government deprives him or her of life, liberty, or property, a protection also afforded citizens under the provisions of the Minnesota Constitution.

110. Plaintiffs have protectable liberty interests—fundamental rights—in free speech and association under the First Amendment, due process of law under the Fourteenth Amendment, and the right to vote, and similar protections afforded under the Minnesota Constitution.

111. The Defendants, either by discriminatory motive or intent, or through reckless or callous indifference to the Plaintiffs' federally and

state protected rights announced and implemented a policy that exercises a standardless discretion over what expressive conduct is characterized as electioneering, leaving them free to censor ideas and enforce their own personal preferences.

112. The Defendants failed to develop objective standards to ensure that citizens such as the Plaintiffs were not disenfranchised, harassed, or otherwise deprived of constitutional rights without due process of law.

113. The threat was imminent and did occur, that the conduct of the Defendants deprived the Plaintiffs of due process of law under the laws of the United States on November 2, 2010, and the deprivation directly and proximately caused Plaintiffs to suffer the loss of their protected freedoms.

114. Plaintiffs request this Court to issue declaratory and injunctive relief under 42 U.S.C. § 1983 to cease and prevent the Defendants' conduct of intentional, reckless, and oppressive disregard of Plaintiffs' due process rights, and further award appropriate monetary damages against the Defendants, with the exception of the Secretary of State, inclusive of costs, attorney fees, and any other relief as this Court deems justified.

COUNT III

Equal Protection Claim against the Defendants

115. The Plaintiffs adopt and incorporate by reference paragraphs 1 through 114 as if fully stated.

116. Plaintiffs' Fourteenth Amendment right to equal protection under the law protects them from intentional and arbitrary discrimination and similar

protections are afforded to citizens under the Minnesota Constitution.

117. The Defendants admit that they adopted a policy that prohibited the wearing of Election Integrity Watch "Please I.D. Me" buttons and Tea Party Patriots clothing at the polling place and did not enforce or otherwise apply a similar policy to other groups.

118. The Defendants by discriminatory motive or intent, or through reckless or callous indifference, announced an implemented a policy to intentionally discriminate against the Plaintiffs by using electioneering laws to impose barriers that thwart and did thwart the exercise of the Plaintiffs constitutional rights based on their association with either the Election Integrity Watch or the Minnesota North Star Tea Party Patriots organizations.

119. In addition, the standardless discretion resulted in the inconsistent enforcement of the Defendants' policies regarding the wearing of "Please I.D. Me" buttons or Tea Party Patriots clothing that caused violations of the equal protection of the laws afforded to the Plaintiffs under the Federal and State Constitutions.

120. The threat was imminent and did occur that Defendants' actions deprived the Plaintiffs of equal protection under the laws of the United States Constitution at the polling places on November 2, 2010.

121. Plaintiffs request this Court to issue declaratory and injunctive relief under 42 U.S.C. § 1983 to cease and prevent the Defendants' conduct of intentional, reckless, and oppressive disregard of

Plaintiffs' Equal Protection rights, and further award appropriate monetary damages against the Defendants, with the exception of the Secretary of State, inclusive of costs, attorney fees, and any other relief as this Court deems justified.

COUNT IV

Minn. Stat. § 211B.11 is Constitutionally Invalid Under the United States and Minnesota Constitutions.

122. The Plaintiffs adopt and incorporate by reference paragraphs 1 through 121 as if fully stated.

123. Minnesota Statue 211B.11, subd. 1 states that

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place . . . . on primary or election day to vote for or refrain from voting for a candidate or a ballot question . . . A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day
>
> * * *
>
> Subd. 4. . . . Violation of this section is a petty misdemeanor.

124. Plaintiffs Minnesota Majority, Minnesota Voters Alliance, and Minnesota North Star Tea Party Patriots have formed a coalition identified as the Election Integrity Watch.

125. Election Integrity Watch is not a political party and does not endorse candidates for elected office or promote or seek to defeat ballot questions.

126. Election Integrity Watch creates and distributes Election Integrity Watch "Please I.D. Me" button.

127. The statement Election Integrity Watch/"Please I.D. Me" is not a "political" badge, a "political" button" or a "political" insignia.

128. Meanwhile, the State of Minnesota makes and distributes "I voted" buttons to voters in the polling place.

129. Minnesota Statute 211B contains no definition of "political." Therefore, since Election Integrity Watch is not a political party and does not endorse candidates, support or seek to defeat ballot questions, the word "political" as seen in the context of the facts of this case is facially constitutionally invalid.

130. Minn. Stat. § 211B does define prohibited "campaign materials" and "political purpose." Neither Election Integrity Watch "Please ID Me" buttons nor Tea Party apparel fit those definitions.

131. The adopted polices of the Defendants and the implementation of the policies resulted in the violation of the Plaintiffs' constitutional rights, and as a direct result of the Defendants actions, Minn. Stat. § 211B.11 is unconstitutional as applied. The adopted policies are not viewpoint neutral, are not narrowly tailored to meet a compelling state interest, and are overbroad and vague. The policies impede to threaten to impede federal and state protected rights of

freedom of speech, association, due process, and equal protection the Plaintiffs seek to achieve and practice.

132. Violation of Minn. Stat. § 211B.11 can result in criminal prosecution.

133. Election managers, election judges, poll workers, and any other person responsible with the conduct of the election process in polling places are obligated to follow and enforce the directives of the statute, which has and will result, because of the way it is written, in the unconstitutional prohibition of certain individuals, such as members or supporters of Plaintiff organizations and coalition from wearing non-campaign buttons and clothing into polling places—perhaps even discouraging them from voting which is and would be a violation of their voting rights.

134. As a result, the Plaintiffs request this Court to declare Minn. Stat. § 211B.11 unconstitutional as violative of the First Amendment of the United States Constitution and the Minnesota State Constitution.

JURY DEMAND

135. Plaintiffs demand a jury trial.

REQUEST FOR RELIEF

136. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing and threatened irreparable harm from the Defendants' present and threatened irreparable harm to their constitutional rights.

137. An actual live controversy exists between the Plaintiffs and the Defendants will respect

to upcoming elections in 2011, 2012 and beyond in which the parties have genuine and opposing interests that are direct and substantial and of which a judicial determination will be final and conclusive.

138. The Plaintiffs have a likelihood of success on the merits of their claims.

139. The public interest and equities favor entry of a court order granting the Plaintiffs the following described declaratory relief, as well as temporary, preliminary, and permanent injunctive relief

WHEREFORE, the Plaintiffs prayerfully request that this Court:

A. Declare that the Defendants are acting in violation of the First Amendment of the United States Constitution;

B. Declare that the Defendants violated the Plaintiffs' protected constitutional rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

C. Declare that the Defendants violated the Plaintiffs' protected constitutional rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

D. Declare that the Defendants violated the protected rights of free speech as protected under the Minnesota Constitution;

E. Declare that the Defendants violated the protected rights of association as protected under the Minnesota Constitution;

F. Declare that the Defendants violated the protected right to vote under the Minnesota Constitution;

G. Declare the Defendants violated the protected right to due process under the Minnesota Constitution;

H. Declare that the Defendants violated the protected rights of equal protection under the Minnesota Constitution;

I. Declare Minn. Stat. § 211B.11 is unconstitutional as applied under the United States Constitution and the Minnesota Constitution;

J. Enjoin all of the Defendants from the enforcement of policies preventing any citizen from wearing the "Please I.D. Me" button or any "Tea Party Patriots" shirts (or hats) in polling places on November 2, 2010;

K. Award compensatory damages and punitive damages against Defendants with the exception of the Secretary of State if warranted;

L. Award Plaintiffs their reasonable attorney fees, litigation expenses, and costs as allowed under 42 U.S.C. § 1988, and other applicable laws, and grant such other relief as this Court deems just to the Plaintiffs and their attorneys.

MOHRMAN & KAARDAL, P.A.

Dated: November 18, 2009

s/Erick G. Kaardal
Erick G. Kaardal, 229647
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074
Attorney for Plaintiffs

FILED 01/06/11

Gary Poser

From: Gary Poser

Sent: Monday, November 01, 2010 2:51 PM

To: Gary Poser

Subject: Political Buttons in Polling Place

Follow Up Flag: Follow up

Flag Status: Green

To: County Auditors and Election Administrators:

Fyi—The U.S. District Court today refused to issue a temporary restraining order preventing enforcement of the prohibition of political badges, political buttons, or other political insignia from being worn at or about the polling place as required in M.S. 211B.11. See attached court order. (Note: The complaint filed by Common Cause with the Office of Administrative Hearings was dismissed).

Accordingly, election judges continue to have the authority to decide what is "political" and to ask voters to cover up or remove political material while in the polling place.

If a voter refuses to cover up or remove the materials, **the election judges must permit any eligible voter to receive a ballot and vote.** However, election judges should document names of voters refusing to cover up or remove the material on the precinct incident log to be referred later to the appropriate authorities.

Attached is a sample letter which we strongly recommend you provide to your municipal clerks to be provided to the election judges.

Gary

Gary Poser
Director of Elections
Office of the Minnesota Secretary of State
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100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul MN 55155
Phone 651-556-0612
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota North Star Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dorothy Fleming, Jeff Davis, Dan McGrath, and Andy Cilek Plaintiffs, vs. Joe Mansky in his individual and official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her individual and official capacity as the Elections Manager for Hennepin County, Mike Freeman in his individual and official capacity as Hennepin County Attorney, Susan Gaertner in her individual and official capacity as Ramsey County Attorney, and Mark Richie in his individual and official capacity as Secretary of State, Defendants.	Court File No. 10-CV-04401 (JNE/MJX) **DECLARATION OF RACHEL M. SMITH** FILED 12/18/14

I, Rachel M. Smith, declare as follows:

1. I am the Elections Manager for the County of Hennepin and a Defendant in the above-captioned case.

2. Attached hereto as Exhibit 1 is a true and correct copy of a November 1, 2010 memorandum that I sent by email to all Hennepin County Election Officials regarding displaying political or campaign materials in the polling place. Hennepin County election officials are generally city clerks or city managers.

3. Attached hereto as Exhibit 2 is a true and correct copy of a November 1, 2010 e-mail that I sent to all Hennepin County Elections Officials, which attached the November 1, 2010 memorandum.

4. Attached hereto as Exhibit 3 is a true and correct copy of page 26 of 257 of the Election Roster from the November 2, 2010 State General Election for Eden Prairie Precinct 11. The dates of birth for individuals have been redacted from this page. This page show that Andrew Eugene Cilek voted in the 2010 General Election.

5. Attached hereto as Exhibit 4 is a true and correct copy of the two-page Election Day incident log from Eden Prairie Precinct 11. The log states the following from 2:45 p.m. entry:

> Tea Party and Button - Would not take shirt or Button off. The Rep.-> from same party - challenger told him that he had to also but he refused. She [the Republican Challenger] said it was against their training. I called the Head Judge. She [Head Judge] told him he [voter] had to

> remove it in order to vote. I showed her [Head Judge] the last minute Elect. Day notes that said that even if he refuses, he can vote. She and he went out of voting area to talk. He did not give his name for me to see if he was eligible to vote. Challenger in hallway told him that court had ruled that he could not wear button/shirt in polling place. **I read instructions from Henn. Cty + told him he could vote if he was eligible. He left + did not return until press/news media arrived.**

(Emphasis added). At 3:30 p.m., there is an entry that says: "T Party man came back to get Challenger name and address."

I declare under penalty of perjury that the foregoing is true and correct.

January 6, 2011

s/ Rachel M. Smith
Rachel M. Smith

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota North Star Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dorothy Fleming, Jeff Davis, Dan McGrath, and Andy Cilek, Plaintiffs, vs. Joe Mansky in his individual and official capacity as the Elections Manager for Ramsey County, Ginny Gelms in her individual and official capacity as the Elections Manager for Hennepin County, Mike Freeman in his individual and official capacity as Hennepin County Attorney, Susan Gaertner in her individual and official capacity as Ramsey County Attorney, and Mark Ri[t]chie in his individual and official capacity as Secretary of State, Defendants.	File No. 10-CV-04401 (JNE/SER) **DECLARATION OF DANIEL P. ROGAN** FILED 12/18/14

I, Daniel P. Rogan, declare as follows:

1. I am a Senior Assistant Hennepin County Attorney and represent Ginny Gelms and Michael O. Freeman in this litigation.

2. Attached hereto as Exhibit 1 is a true and correct copy of a page from EIW's website: http://electionintegritywatch.com/about (last visited on Dec. 28, 2010).

3. Attached hereto as Exhibit 2 is a true and correct copy of a page from EIW's website: http://electionintegritywatch.com/ActionPlan (last visited on Dec. 28, 2010).

4. Attached hereto as Exhibit 3 is a true and correct copy of sections of the CNN/ORC International Poll, reporting on results from a telephone poll of adult Americans from November 21-23, 2014. The complete set of poll results can be found at http://i2.cdn.turner.com/cnn/2014/images/12/02/cnnorcpoll12022014.pdf (last visited on Dec. 17, 2014). According to the poll, 32% of respondents had a favorable view of the Tea Party; 50% had an unfavorable view; 5% had never heard of the Tea Party; and 13% had no opinion. Ex. 3 at 11. In addition, according to the poll, 15% of individuals who identified themselves as liberal had a favorable opinion of the Tea Party, while 75% had an unfavorable opinion. Ex. 3 at 28. In contrast, 55% of individuals who identified themselves as conservative had a favorable opinion of the Tea Party, while 29% had an unfavorable opinion. *Id.*

5. Attached hereto as Exhibit 4 is a true and correct copy of portions of a June 2014 Pew Research Center report, entitled *Beyond Red vs. Blue:*

the Political Typology. The report is based on a national survey of 10,013 adults in the United States, conducted from January 23 to March 16, 2014 by the Pew Research Center. The poll indicates that 18% of respondents agree with the Tea Party movement and 28% disagree. Ex. 4 at 172. However, 53% of individuals described as steadfast conservatives agree with the Tea Party movement and only 6% of steadfast conservatives disagree, while 78% of individuals described as solid liberals disagree with the Tea Party movement and only 2% of solid liberals agree. Ex. 4 at 23.

6. Attached hereto as Exhibit 5 is a true and correct copy of an article written by Kate Zernike, entitled *Tea Party Comes to Power on an Unclear Mandate*, from the N.Y. Times and dated Nov. 2, 2010.

7. Attached hereto as Exhibit 6 is a true and correct copy of an article written by Mark Leibovich and Ashley Parker, entitled *Tea Partiers and Republican Faithful Share Exuberant Celebrations*, from the N.Y. Times and dated Nov. 3, 2010.

8. Attached hereto as Exhibit 7 is a true and correct copy of an article written by Kevin Diaz, entitled *Bachmann blasts president in first Tea Party rebuttal*, from the Star Tribune and dated Jan. 26, 2011.

9. Attached hereto as Exhibit 8 is a true and correct copy of an article written by Mark Zdechlik, entitled *Some Business Groups Signaling They've Had Enough of Tea Party*, from Minnesota Public Radio and dated Oct. 28, 2013.

10. Attached hereto as Exhibit 9 is a true and correct copy of an article written by Cyndy Brucato, entitled *When is an endorsement not an 'endorsement'?*, from MinnPost and dated Sept. 10, 2014.

11. Attached hereto as Exhibit 10 is a true and correct copy of the website of U.S. House of Representatives, Committee on House Administration, identifying the Congressional Member Organizations from the 111th Congress. The website address is: http://cha.house.gov/member_orgs 111th.aspx (last visited on Dec. 28, 2010). The second page of Exhibit 4 identifies the House Tea Party Caucus, which was approved on July 19, 2010, with Representative Michele Bachmann as Chair.

12. Attached hereto as Exhibit 11 is a true and correct copy of a page from Rep. Michele Bachmann's Congressional website, listing 52 Republican members of the U.S. House of Representatives as members of the House Tea Party Caucus. This page can be found at http://bachmann.house.gov/News/DocumentSingle.aspx?DocumentID=199440 (last visited on Dec. 28, 2010).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 18, 2014 s/Daniel P. Rogan
Daniel P. Rogan

Election Integrity Watch is a joint project of Minnesota Majority, Minnesota Voters Alliance, Freedom Council and the Northstar Tea Party Patriots. The project's objective it to improve the overall integrity of elections in Minnesota by training thousands of voters on how to spot voter fraud and what to do about it when they do.

Minnesota Majority has been conducting research into Minnesota election irregularities since 2008. The organization's findings have been featured by a number of major news organizations, including Fox News, The Washington Examiner, the Wall Street Journal, Pioneer Press, KSTP, KMSP and the Star Tribune.

Minnesota Voters Alliance citizens' group formed with the primary purpose of empowering the electorate. They are currently working to pass voter photo ID in both state and city government.

Northstar Tea Party Patriots is an alliance of tea party groups from across the state of Minnesota. Their goal is to attract, educate, organize, and mobilize citizens to secure public policy consistent with our three core values of Fiscal Responsibility, Constitutionally Limited Government and Free Markets.

Click here to print a one-page overview of the Election Integrity Watch program.

Contact Us

Use the form below to send us a message.

Your Name (required)

Your Email (required)

Subject

Your Message

Send

http://www.electionintegritywatch.com/about/

EXHIBIT 1

Follow our six-step action plan for becoming part of the Election Integrity Watch team:

1. **Get Your Button** - Order an Election Integrity Watch button and wear it when you go to the polls on November 2 as a visible message to others that you are watching for voter fraud.

2. **Know What to Watch For** - Review our Election Integrity Watch List so that you are educated on what to watch for at the polls.

3. **Register as a Volunteer** - Sign-up to volunteer in one or more capacities as part of our Election Integrity Watch team. Our goal is the have thousands of Minnesotans registered as volunteers by November 2.

4. **Show Your ID** - When you go to vote on November 2, wear your Election Integrity Watch button and show your photo ID when you sign-in to vote. While Minnesota does not require an individual to show an ID, let's act like it does. This simple act of showing an ID will likely result in a spontaneous

reaction from others in line behind you to show their ID as well. Any person in line thinking about committing voter impersonation will likely be dissuaded from doing so. (Although polls show that over 80% of Minnesotans support requiring a photo ID to vote, this measure has been repeatedly block by leaders in the Minnesota state legislature).

5. **Report Suspicious Activities** - If you spot suspicious activity on Election Day, call our hotline number at **877-602-WATCH** or log an incident on our website. Take notes about what you saw—what you saw, when it occurred, where it took place and who was involved (ask people for their names). Take a photograph of the license plate of any vehicles involved (note - you must be at least 100 feet away from the polling place). If the incident involves a van or bus carrying multiple people to a polling place, try to follow the vehicle to see if it goes to other polling places.

6. **Donate**: Help us create public awareness of the Election Integrity Watch program by making a contribution to support our radio advertisements.

Comments are closed.

Our Motto: "WATCH, RECORD and REPORT, don't CONFRONT"

Powered by WordPress. Mandigo theme by tom.
Entries (RSS) and Comments (RSS).

http://www.electionintegritywatch.com/action-plan/

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dorothy Fleming, Jeff Davis, Dan McGrath, Eugene F. Delaune II, and Randy Liebo, Plaintiffs, vs. Joe Mansky in his official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her official capacity as the Elections Manager for Hennepin County, Mike Freeman in his official capacity as Hennepin County Attorney, Susan Gaertner in her official capacity as Ramsey County Attorney, and Mark Richie in his official capacity as Secretary of State, Defendants.	Court File No. 10-CV-4401 JNE/SRN **DECLARATION OF DAN MCGRATH** Filed 01/14/15

DECLARATION

I, Dan McGrath, declare and make the following statements:

1. I am a plaintiff in the instant lawsuit. Therefore, I am familiar with the facts of the underlying complaint.

2. I am also familiar with organizations that endorse candidates as the former director of Minnesota Majority, a Minnesota 501(c)(4) nonprofit organization with members formed in the interest of transparency in government, protecting identified values as they interrelate with political issues, including oversight, investigation, and reform concerning election and voter or voter registration irregularities. Minnesota Majority did not endorse candidates seeking elected or appointed offices.

3. I am aware for instance, that the National Rifle Association as a national organization, endorses candidates and has done so in Minnesota. In 2010, the NRA endorsed six congressional incumbents for office, three from the GOP and three democrats. An article titled, "NRA sprays its Minnesota endorsements to six congressional incumbents - 3 from GOP and even 3 Democrat," a copy of which is attached as **Exhibit 1**, the article identified the candidates as U.S. Representatives Democrats Tim Walz, Collin Peterson, and Jim Oberstar. Incumbent Republicans who got NRA support including John Kline, Erik Paulsen, and Michele Bachmann.

4. The NRA does have clothing apparel or buttons which promote the NRA. The NRA has a significant presence in Minnesota politics. In an article from the Star Tribune, a copy of which is

attached as **Exhibit 2**, has the headline, "NRA faces major test of clout in Minnesota." The article goes on to state that

> "Between 2008 and 2012, the NRA spent just $5,240 on Minnesota legislative races. In 2012, the liberal group Alliance for a Better Minnesota spent $144,365 to defeat a single legislative candidate in Edina.
>
> Strength is membership.
>
> The NRA "'spends money where they have to spend money, and they obviously don't have to spend it in Minnesota,'" said Joe Olson, director of the Gun Owners Civil Rights Alliance in Minnesota and a former NRA national board member. "'The strength of the NRA . . . is their membership. Once they're provided with direction, they go and do it."
>
> A copy of the article from the web is attached as **Exhibit 2**.

5. In a similar vein, I found an article on the web concerning the Minnesota Gun Owners Political Action Committee that endorsed three State Representatives "that have proven themselves as leaders for gun rights in Minnesota . . . Tony Cornish . . . Republican Part of Minnesota; David Dill . . . Democratic-Farmer-Labor Party; Steve Drazkowski . . . Republican Party of Minnesota." A copy of that article is attached as **Exhibit 3**.

6. I have found no evidence that people who wore NRA apparel (or buttons) were targeted for

possible prosecution during the November 2010 election or any election since if worn in the polling place.

7. I also found that TakeAction MN is an organization in Minnesota endorses candidates. As its endorsement overview states, "TakeAction Minnesota endorses candidates to further our mission of social, racial, and economic justice. Through our screening process, we choose candidates who will champion progressive issues and can build a winning campaign. After endorsement, members volunteer through TakeAction to win elections and hold elected officials accountable." A copy of that endorsement overview is attached as **Exhibit 4**.

8. I was unable to locate on the web the actual names of candidates TakeAction Minnesota has recently endorsed.

9. TakcAction Minnesota has t-shirts, sweaters, and buttons available for people to wear.

10. I have found no evidence that people who wore Take Action apparel (or buttons) were targeted for possible prosecution during the November 2010 election or any election since if worn in the polling place.

11. I am also familiar with the events concerning people wearing t-shirts with "Don't tread on me" statements, Gadsden Flag emblems and the like and "Election Integrity Watch" buttons during the November 2010 election. I wore an "Election Integrity Watch" button.

12. I own and did wear a button that read "Election Integrity Watch" on election day, November 2, 2010, in my respective polling place when I cast my

vote in Hennepin County. I was hoping to wear this button in future elections.

13. The "Election Integrity Watch" button was a creation of Election Integrity Watch. It stated "PLEASE ID ME;" that provides a telephone number "877.602.WATCH;" that provides a website address "ELECTIONINTEGRITYWATCH.COM;" and has a back ground picture of a drawn human eye similar to that found on "neighborhood watch signs" that are posted in some neighborhoods to deter and report crimes.

14. I did not expect the government would prohibit the "Election Integrity Watch" button from the polling place as it intended to do in November 2010. When I did wear the button into the polling place, my name and address were taken for possible prosecution.

15. I believe the "Election Integrity Watch" button is an expression of my right to free speech or association with the Election Integrity Watch coalition and its member associations.

16. Because of past events and my name taken for possible prosecution, I have been advised not to wear the "Election Integrity Watch" button in my polling place for fear of either an election judge or another poll worker will prohibit my ability to vote, therefore depriving me of that protected right.

17. I believe there is nothing in the wearing of the "Election Integrity Watch" button that endorses (or proposes the defeat) a specific candidate or ballot question and I do not believe the button qualifies as prohibited campaign materials in the polling place as defined by state law.

18. In preparation for the 2010 election, Minnesota Majority, Minnesota Voters Alliance and the Minnesota Northstar Tea Party Patriots formed a coalition referred to as "Election Integrity Watch," a concerned grass roots effort to protect election integrity.

19. As then Executive Director of Minnesota Majority I am familiar with the two other organizations that comprise Election Integrity Watch. None of the organizations are political parties. None of the organizations endorsed candidates.

20. Minnesota Majority was not a political organization.

21. Minnesota Majority did not endorse candidates. Furthermore, it took no position to promote or to defeat any ballot question.

22. There was no ballot question for Minnesota voters to vote upon regarding voter identification or other voter identification issues.

23. There was no political campaign related to voter identification.

24. There was nothing on the button that indicates the support of or encourages the vote for a particular candidate for elected office.

25. At the advice of counsel, I still have not worn the button since the 2010 election and believe that it is an infringement of my right to free speech.

I declare that the statements made here are to the best of my knowledge and recollection and are truthful. I understand the penalties of the law for perjury under the laws of the United States.

Dated: January 14, 2015.

/s/ Dan McGrath
Dan McGrath

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dan McGrath, and Andy Cilek, Plaintiffs, vs. Joe Mansky in his individual and official capacity as the Elections Manager for Ramsey County, Ginny Gelms in her individual and official capacity as the Elections Manager for Hennepin County, Mike Freeman in his individual and official capacity as Hennepin County Attorney, Susan Gaertner in her individual and official capacity as Ramsey County Attorney, and Mark Ri[t]chie in his individual and official capacity as Secretary of State, Defendants.	Court File No. 10-CV-4401 (JNE/SER) **DECLARATION OF ANDY CILEK** FILED 01/14/15

I, Andy Cilek, declare and make the following statements:

1. I am an eligible and registered voter in Hennepin County, Minnesota.

2. I am a plaintiff in this lawsuit and am familiar with the facts as stated in my declaration.

3. I am a United States citizen. I vote for the candidates I believe will do the best job without labeling that person as right, left, moderate, or extreme. I am also a supporter of veterans, people currently serving our country in the armed services. I will admit I am not a fan of big government or high taxes, but understand taxes are necessary for the function of governing.

4. I voted in November 2010, but only after close to a five-hour delay. Prior to my casting of my ballot, I was stopped by election officials as I entered my polling place and refused to be given a ballot to vote or otherwise enter my name in the voting register log to obtain a ballot.

5. On that particular day, I wore a t-shirt with the huge printed statement "Don't tread on me." The t-shirt also had the statement "Tea Party Patriots" on it as well in small print.

6. I liked the apparel for the statement "Don't tread on me." I saw that statement as symbolic of whom I am as a person - independent as a thinker and doer - and that others should not take advantage of me or disrespect me. The Tea Party Patriots small logo was of little consequence to me as I wore that shirt for years after until it literally wore out.

7. I am not a member of the Minnesota Tea Parry Patriots. And as I recall, the Minnesota Tea

Party Patriots did not in 2010, or at the present time, endorse candidates.

8. I am however, a member of the Christian faith. Familiar with its doctrines, I do not necessarily agree with their pronouncements. For instance, on the issue of abortion I believe in the right of choice.

9. I also wore a button that said "Election Integrity Watch, "Please I.D. Me," on that November 2010 election day.

10. On that election day in November 2010, I was told by election officials that I could not vote unless I either covered my shirt and button or took the items off. I refused and left the polling place.

11. After waiting in the parking lot, I tried to enter the polling place but was refused entry and told not to try again. After retreating again to the parking lot I contacted my attorney, Erick Kaardal, who came to the parking lot. I wanted to vote. After several hours, news journalists arrived. With that arrival, a final attempt to vote was made. At that point I was able to vote. However, an election judge took my name and address down for possible prosecution by the Hennepin County Attorney's Office for wearing my t-shirt or my button or both.

12. I was aware of the election policy Hennepin County had implemented to stop people who wore t-shirts or other apparel with statements on them. As I understood the policy, the election officials were to take down names and addresses of those people for possible prosecution by the County Attorney's Office.

13. I couldn't believe the County would target me under its policy.

14. I did not expect the prohibition of these buttons from the polling place, and if not removed or covered would result in the deprivation of my right to vote for almost five hours and required the news media to get me into the polling place. It was not my intent to draw that attention.

15. Regardless, I believed then, as I do now, the items were expressions of free speech.

16. I believe the statement "Don't tread on me" does not and never did as my statement of self expression endorsed (or proposed the defeat of) a specific candidate or ballot question.

17. The "Election Integrity Watch" buttons did not endorse any candidate or question on November 2, 2010.

18. There is nothing about the "Election Integrity Watch" button that endorses, causes confusion, undue influence, or is in any other way related to a political campaign.

19. I knew the candidates on the ballot who I would vote for and those I would not. I agreed with some candidates regarding their position on certain issues, and I disagreed with others. But who I voted for was my business and the statement on my t-shirt that day did not give my support to any particular candidate on the ballot. In fact, my t-shirt did not name a candidate. And as I recall there was no ballot question on the ballot and therefore, the t-shirt neither supported nor sought the defeat of a ballot question.

20. Regardless, I did not enjoy the prospect of having my name and address taken for possible prosecution by the government.

21. I enjoy wearing t-shirts with slogans, or statements.

22. I also know that since 2010, there have been numerous controversies on the local, state, and national scenes. For instance, there were controversies over the new Vikings stadium and how to fund that almost $ 1 billion project. War and terrorism is not far from the headlines. Increased taxes, property taxes, the economy, business growth, school bond referendum, climate warming or other environmental issues to name a few continue to be in the news. Candidates in favor of or against any one of these issues have sought election or re-election. Referendum have reached the ballot as election questions. Local Minnesota corporations such as Target have donated tens of thousands of dollars to organizations that support republican and democratic candidates and to one organization called MN Forward that created ads for an antigay candidate. A copy of an article relating to that controversy is attached as **Exhibit 1**.

23. I have seen voters in polling places that have worn red Target shirts with a Target bulls-eye symbol on the apparel.

24. After my election experience in November 2010, I have become fearful of wearing any type of clothing in the polling place that may be interpreted as supporting some sort of philosophy or position of a candidate without

naming that candidate—including a ballot question.

25. My attorney warned me not to wear any such clothing since the County policy to prosecute people remained in place. Thus, by the advice of my attorney I have not wore any apparel that might have either a statement or label of the manufacturer showing for fear of prosecution. Whether I agree or disagree with a statement or label of a manufacturer or corporation is not indicative of my own personal political or philosophical beliefs. If it looks good on me I wear it.

26. I have voted in elections since November 2010. I have seen people wearing all red or all blue apparel. I have seen people wearing apparel with corporate logos. I have seen people wearing apparel of the organization that I know endorse candidates such as the Sierra Club. I also know that candidates on the ballot hold "republican views" also represented by "red" in the news media. I know of candidates on the ballot that hold "democratic views" represented by "blue" in the news media. I also know of candidates that represent "green" views or were for or against the Vikings new stadium, for or against gay marriage, new taxes, bond referendum, and candidates that support our troops but disagree on defense spending or are in favor of greater defense spending. When I was threatened with prosecution in November 2010, I did not see another person targeted for possible prosecution or told to cover their apparel or remove their apparel because they

held the same or similar belief of a candidate on the ballot regardless of what they wore.

27. I remain fearful of prosecution and of being targeted by County officials when I enter a polling place. I have not worn what I would like to wear because of that fear when I vote. I was and felt targeted then and would feel the same if I wore an all blue t-shirt, or an all red t-shirt or a Vikings shirt, or a green shirt or a red tie with elephants, a blue tie with donkeys, a tie with whales on it or trees as I enter a polling place. I wear clothing that I like regardless of what other people might think it means but cannot on election day.

I declare that the statements made here are to the best of my knowledge and recollection and are truthful. I understand the penalties of the law for perjury under the laws of the United States.

Dated: January 14, 2015.

/s/ Andy Cilek
Andy Cilek

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dorothy Fleming, Jeff Davis, Dan McGrath, Eugene F. Delaune II, and Randy Liebo, Plaintiffs, vs. Joe Mansky in his official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her official capacity as the Elections Manager for Hennepin County, Mike Freeman in his official capacity as Hennepin County Attorney, Susan Gaertner in her official capacity as Ramsey County Attorney, and Mark Richie in his official capacity as Secretary of State, Defendants.	Court File No. 10-CV-4401 JNE/SRN **DECLARATION OF THE MINNESOTA VOTERS ALLIANCE** FILED 01/14/15

DECLARATION

I, Andy Cilek, on behalf of the plaintiff Minnesota Voters Alliance declare and make the following statements:

1. I am the founder and Executive Director of Minnesota Voters Alliance. The MVA has been active on many issues involving voting such as instant runoff voting, nonpartisan elections, judicial elections, and photo identification at the polls. The MVA is also involved in school district issues namely, reporting of school district campaign finance activities.

2. The MVA is not a political party under Minn. Stat.§ 200.02 which states that a "political party" means an association of individuals under whose name a candidate files for partisan office.

3. In 2010, in a one-time relationship, the MVA joined Election Integrity Watch with Minnesota Majority and Minnesota Northstar Tea Party Patriots in which Election Integrity Watch created and distributed "Please I.D. Me" buttons.

4. The "Please I.D. Me" buttons did not endorse any candidate or ballot question that might have appeared on the ballot on November 2, 2010.

5. There was nothing about the "Please I.D. Me" button that endorsed, caused confusion, caused undue influence, or was in any other way related to a political campaign. Since November 2010, the MVA has not seen any evidence that the button endorsed, caused confusion, caused undue influence, or was in any other way related to a political campaign on that day.

6. The MVA was aware of the pronouncements of County attorneys, and in particular the Defendant Mike Freeman, Hennepin County Attorney not to allow "Please I.D. Me" buttons in polling places—viewing them as campaign buttons.

7. The MVA was aware of the pronouncements of Defendant Joe Mansky prohibiting "Election Integrity Watch" buttons from Ramsey County polling places.

8. The MVA was also aware that persons associated with the MVA could have been prosecuted under Minnesota Statute § 211B.11 as it related to any enforced prohibition of the "Election Integrity Watch" buttons in or around polling places. MVA members or those associated with the MVA could have had their respective names taken down with their addresses for possible prosecution.

9. Some MVA associates and members also wore t-shirts that had statements of expression such as "Don't tread on me" or "Liberty" or "Remember me in November" or wanted to. They were fearful of possible prosecution if worn. They have since been told not to do so and to the best of the MVA's knowledge, no member or associate has worn them since to a polling place on election day.

10. The t-shirts did not endorse a particular candidate or ballot question in November 2010.

11. The t-shirts were not thought of as endorsing a particular candidate or ballot question if a question was on the ballot

12. The t-shirts were thought of as an expression of free speech.

13. Regardless, MVA members are concerned about prosecution and will not wear them for fear of prosecution in the polling place. MVA counsel has also advised them not to do so.

14. The MVA is aware that the Sierra Club, its Minnesota North Star Chapter, does endorse candidates. It is a well-known advocate for protecting the environment. Attached as **Exhibit A** is the North Star Chapter's elections and endorsements for the 2014 general election. The MVA believes the North Star Chapter endorsed candidates in 2010. The MVA notes the 2014 endorsements included the U.S. House of Representatives, Secretary of State, and the State House of Representatives. Sierra Club apparel can be purchased and worn by individuals. **Exhibit A** is a copy of the North Star Chapter endorsement page from the web. The endorsement page also notes that "The Sierra Club is pleased to endorse the following Minnesota candidates for office in the 2014 general election, in recognition of their strong support for and commitment to environmental issues . . . ." **Exhibit A.**

15. The MVA has found no evidence that people who wore Sierra Club apparel (or buttons) were targeted for possible prosecution during the November 2010 election or any election since if worn in the polling place.

16. The Minnesota AFL-CIO makes political endorsements. In 2014, the Minnesota AFL-CIO made endorsements for United States Senate, Secretary of State, State Auditor, U.S. House of Representatives, and the Minnesota House of Representatives as found in **Exhibit B**. The MVA believes people wear apparel that signify that he or she belong to the Minnesota AFL-CIO. The endorsement page noted this quote

from the Minnesota AFL-CIO's President Shar Knutson: "The 2013 and 2014 legislative sessions were some of the most productive sessions for working people in a generation. Their focus on middle class values like investing in education and job creation is working as Minnesota's economy continues to strengthen." It went on to say that "[a]n endorsement from the Minnesota AFL-CIO means that the candidate has a strong commitment to supporting the values and priorities of working people." **Exhibit B**. **Exhibit B** is a copy of the Minnesota AFL-CIO endorsement page from the web.

17. The MVA has found no evidence that people who wore Minnesota AFL-CIO apparel (or buttons) were targeted for possible prosecution during the November 2010 election or any election since if worn in the polling place.

18. The MVA found that Minnesota Education, "the union of 70,000 educators" endorsed candidates in, for example, 2012. On the endorsement page, Education Minnesota announced the endorsement of 85 races for the Minnesota State legislature. It read, "[w]hile some of the endorsements were earned by the pro-education track record of incumbents, other candidates were endorsed after going through a screening process with local educators." The announcement went on to say that "[w]e're confident we can work with this bipartisan group to build the best system of public education in the nation." **Exhibit C** is a copy of the 85 endorsements of candidates. All of the candidates in this group of 85 are from the DFL party but for two GOP candidates. It is believed members of Minnesota

Education wear apparel or buttons from that organization.

19. The MVA has found no evidence that people who wore Minnesota Education apparel (or buttons) were targeted for possible prosecution during the November 2010 election or any election since if worn in the polling place.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: January 14, 2015.

/s/Andy Cilek
Minnesota Voters Alliance, through Andy Cilek, Director

No. 16-1435

In The
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE;
ANDREW E. CILEK; and SUSAN JEFFERS,
Petitioners,

v.

JOE MANSKY, in his official capacity as Elections Manager for Ramsey County; VIRGINIA GELMS, in her official capacity as Elections Manager for Hennepin County; MIKE FREEMAN, in his official capacity as Hennepin County Attorney; JOHN CHOI, in his official capacity as Ramsey County Attorney; and STEVE SIMON, in his official capacity as Secretary of State of Minnesota,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Is Minnesota Statute Section 211B.11(1), which broadly bans all political apparel at the polling place, facially overbroad under the First Amendment?

CORPORATE DISCLOSURE STATEMENT

Minnesota Voters Alliance is a nonprofit 501(c)(4) corporation incorporated under the laws of Minnesota. Minnesota Voters Alliance has no parent corporation, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Eighth Circuit affirming final judgment against Petitioners is reported at 849 F.3d 749 (8th Cir. 2017), and reproduced in Petitioners' Appendix (Pet. App.) A. The related opinion of the district court rejecting Petitioners' as-applied challenge and entering final judgment is unreported, and reproduced in Pet. App. B. An interim order of the district court, granting Defendant Mark Ritchie's motion for summary judgment in part, and denying the motion in part, is reported at 62 F. Supp. 3d 870 (D. Minn. 2014), and reproduced in Pet. App. C.

The Eighth Circuit's opinion rejecting Minnesota Voters Alliance's (MVA's) facial challenge is reported at 708 F.3d 1051 (8th Cir. 2013), and reproduced at Pet. App. D. The Eighth Circuit denied rehearing en banc, over the dissent of Judge Smith and Judge Shepherd, on May 7, 2013, in an order reproduced in Pet. App. F. The district court opinion rejecting the facial challenge is reported at 789 F. Supp. 2d 1112 (D. Minn. 2011), and reproduced in Pet. App. E.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered final judgment in this case on February 28, 2017. The petition for a writ of certiorari was filed on May 30, 2017, and granted on November 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment, as incorporated against the states by the Fourteenth Amendment, provides

that the states "shall make no law . . . abridging the freedom of speech."

Minnesota Statute Section 211B.11(1) provides, in relevant part: "A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." The full statute is reprinted in an appendix to this brief.

INTRODUCTION

This case involves a statutory restriction on political speech of breathtaking reach; one that suppresses perhaps the most peaceful method of political expression—the silent wearing of clothing and other apparel that conveys a political message, logo, or group affiliation.

The provision at issue, the third sentence of Section 211B.11(1), came to prominence when members of Minnesota Voters Alliance (MVA), and other Petitioners (collectively referred to as "MVA"), attempted to wear expressive t-shirts and buttons into polling places during the November 2010 Minnesota election. Pet. App. D-3-4. One representative t-shirt contained the image of the Gadsden flag and the message "Don't Tread on Me." Joint Appendix (JA) 114, ¶¶ 5-6; *id.* at 116, ¶¶ 16-19. None of the apparel solicited votes for or against candidates or issues on the ballot. *Id.* at 110-11, ¶¶ 16-19. Nevertheless, polling officials told MVA that Section 211B.11(1) prohibited such politically expressive apparel in the polling place. Pet. App. D-3-4.

Since then, the government Respondents (collectively, "the Government") have made clear that Section 211B.11(1) reaches—and indeed, criminalizes—all political speech that can be

communicated through shirts, hats, buttons, and other apparel. Pet. App. E-13, 25, 28, 29. The statute bars every item referring to any candidate, party (on the ballot or not), politically involved organization, political ideology, political message or symbol, and "all manner of political views." *Id.* at E-15; *see also* Pet. App. A-6 ("all political material is banned."). Moreover, the law gives polling place officials discretion to decide which messages are "political" and thus, illegal in polling places, and which messages are non-political and permissible. *Id.* at E-22-23. The opportunity for abusive application of the law to disfavored viewpoints, and to protected non-political speech, is obvious and untenable.

The Government believes that the public's interests in peace, order, and influence-free elections justify its broad ban on political apparel. They do not. No conceivable governmental interest can sustain a statute that prohibits, and chills, the entire realm of political speech that can be conveyed on apparel. *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 573-76 (1987).

Political speech must be jealously guarded—wherever it is encountered. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 (1999) (courts must be "vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas"). This is especially true when it is communicated through a common, affordable, and passive means of speech, one that imposes no demands or burdens on others. Partial restrictions on this form of speech will usually be unconstitutional. Statutes which totally prohibit it are plainly overbroad and unconstitutional. *Jews for*

Jesus, 482 U.S. at 576; *see also United States v. Grace*, 461 U.S. 171, 186-88 (1983) (Marshall, J., conc. in part, dis. in part). Minn. Stat. § 211B.11(1) is such a statute.

STATEMENT OF THE CASE

A. Factual Background

1. The Ban on "Political" Apparel and Statutory Context

Minnesota Election Code Chapter 211B prescribes a set of "Fair Campaign Practices." Section 211B.11, entitled "Election day prohibitions," regulates certain activities "near polling places." The first subdivision of the section, entitled "Soliciting near polling places," is relevant here.

The first sentence in Section 211B.11(1) forbids active campaigning at polling places. It declares that people "may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet" of a polling place. The second sentence in the subsection bars people from "provid[ing] political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election." Neither of these provisions is challenged here.

The third sentence of Section 211B.11(1) is at issue. It states: "[a] political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." Minn. Stat. § 211B.11(1). The Government recognizes that this provision includes political clothing and other "paraphernalia." Opposition to the Petition for Certiorari (Opp.) at 24, 35.

Section 211B.11(1) applies not only in polling places on primary and election days, but also for 46 days prior to an election in at least 87 county absentee voting areas. Minn. Stat. §§ 211B.11(1); 203B.081(1). If citizens wear political apparel when voting, a complaint may be filed against them in the Office of Administrative Hearings. Minn. Stat. § 211B.32. That Office may impose civil penalties of up to $5,000 against the offender, Minn. Stat. § 211B.35(2), and/or refer the case to county prosecutors for possible criminal charges, Minn. Stat. § 211B.11(4); *see also* JA 52-53.

The purposes underlying the political apparel ban are not apparent from the text of Section 211B.11(1). The Government contends that it is "designed to protect Minnesotans' right to vote in an orderly and controlled environment without confusion, interference, or distraction." Opp. at 4. The Eighth Circuit believed the law is meant to "maintain peace, order and decorum" in the polling place, to "protect[] voters from confusion and undue influence," and to "preserv[e] the integrity of its election process." Pet. App. D-8 (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992)).

At least nine other states have enacted similar restrictions on political apparel at polling places.[1] Many of these statutes, including Minnesota's, were passed in the late 1800's. At the time, the available political apparel was largely limited to campaign

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[1] *See* Del. Code Ann. tit. 15, § 4942; Kan. Stat. Ann. § 25-2430(a); Mont. Code Ann. § 13-35-211(1); N.J. Stat. Ann. § 19:34-19; N.Y. Elec. Law § 8-104(1); S.C. Code Ann. § 7-25-180(B); Tenn. Code Ann. § 2-7-111(b)(1); Tex. Elec. Code Ann. § 61.010(a); Vt. Stat. Ann. tit. 17, § 2508(a).

buttons and other candidate-specific items. *Picray v. Secretary of State*, 916 P.2d 324, 329 n.12 (Or. Ct. App. 1996) (quoting Roger A. Fischer, *Tippecanoe and Trinkets Too* vii-viii (1988)).[2]

Section 211B.11(1) is only one of many Minnesota statutes that regulate polling places. For instance, Section 211B.07 of the Election Code, entitled "Undue Influence on Voters Prohibited," prevents a person from "directly or indirectly" trying "to compel [an] individual to vote for or against a candidate or ballot question" through the use of force and influence. Another portion of this section bars the use of fraud "to obstruct or prevent the free exercise of the right to vote of a voter at a primary or election, or compel a voter to vote at a primary or election." Similarly, Minn. Stat. § 204C.035(1), entitled, "Deceptive Practices in Elections," states: "No person shall knowingly deceive another person regarding the time, place, or manner of conducting an election or the qualifications for or restrictions on voter eligibility for an election, with the intent to prevent the individual from voting in the election." Finally, Minn. Stat. § 204C.06 limits access to polling places and prohibits disorderly conduct.

As in most states, polling places in Minnesota are established on election day in a wide variety of buildings and locations, including churches, city halls, and county offices. *See generally* Office of Minn. Sec'y of State, Polling Place Finder, http://pollfinder.sos.state.mn.us/ (last visited Dec. 21,

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[2] By most reports, the t-shirt itself was not invented until the early 20th century. *See* Tee Fetch, *History of the T-shirt*, http://www.teefetch.com/history-of-the-t-shirt/ (last visited Dec. 21, 2017).

2017). According to Respondent Mansky, voters are in a polling place for ten minutes or less. JA 56, ¶ 11.

2. The "Election Day Policy"

As the 2010 election approached, state and local election officials in Minnesota created and distributed an Election Day Policy (Policy) which provided guidelines for enforcement of Section 211B.11(1). *See* Pet. App. I-1-2. As Minnesota's Secretary of State explained below,

> officials from the [] county offices, in consultation with representatives of the Secretary of State's Office, drafted a sample letter to aid county election officials and election judges statewide in their application of Minn. Stat. § 211B.11 . . . . Gary Poser, the Office of Secretary of State's Elections Director, then sent the sample letter . . . via e-mail to county elections officials in each Minnesota county.

2011 Brief of Appellee Ritchie at 3-4 (8th Cir. Sept. 21, 2011); *see also* Declaration of Gary Poser dated Jan. 6, 2011 [Dist. Ct. Docket Entry No. 57] ¶¶ 5-7.

The Policy states that "Minnesota law prohibits persons from wearing 'political badges, political buttons, or other political insignia' *or* displaying campaign material at the polling place." Pet. App. I-1. (emphasis added). It notes that "[e]lection judges have the authority to decide what is 'political'" for purposes of Section 211B.11(1). *Id.*

The Policy then provides examples of impermissible "political" apparel. These "include, but are not limited to:"

> • Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.
>
> • Any item including the name of a candidate at any election.
>
> • Any item in support of or opposition to a ballot question at any election.
>
> • [Any] [i]ssue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).
>
> • [Any] [m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.Org, and so on).

Pet. App. I-1-2.

In separate, pre-election communications with Petitioner Susan Jeffers, an election judge in Ramsey County, JA 34, Respondent Mansky confirmed that the statute prohibits Tea Party shirts and buttons in Ramsey County polling places. JA 34, ¶ 3; *id.* at 56, ¶ 9. He also indicated that the statute could bar a "Minnesota Vikings" shirt if there was an issue related to the football team on the ballot, such as construction of a new stadium. JA 34-35. In lower court arguments, the Government conceded that the "political" apparel ban extends to all politically-involved organizations, and would thus ban shirts referring to the Chamber of Commerce and the AFL-CIO. Oral Argument at 19:48, *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (No. 11-2125).[3]

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[3] http://media-oa.ca8.uscourts.gov/OAaudio/2012/2/112125.MP3.

Once an election official decides that a citizen is wearing illegal "political" material, the Policy directs the official to "[a]sk the individual to either cover up or remove the political material while in the polling place." Pet. App. I-2. If the person does not comply, the Policy directs election judges to allow the offender to vote, but also to record his or her name, address, and the nature of the offending "political" item for referral to "appropriate authorities" for potential fines and criminal prosecution. *Id.*

3. Enforcement of the "Political" Apparel Ban

Prior to the 2010 election, the North Star Tea Party Patriots created t-shirts and hats with a Tea Party emblem and slogans like "Fiscal Responsibility, Limited Government, Free Markets," "Liberty," "Remember Me in November," and "Don't Tread on Me." JA 71-72; Pet. App. H-1-2. The Tea Party did not endorse or oppose any candidates or issues on the 2010 ballot. JA 71-72. With assistance from MVA and other organizations, the Tea Party helped form Election Integrity Watch (EIW), "a grass roots effort to protect election integrity."[4] JA 70; Pet. App. E-3. EIW subsequently produced a small button that stated "Please I.D. Me" on a background image of a human eye, along with EIW's telephone number and website address. Pet. App. E-3, G-1.

During the 2010 election, MVA members and other citizens wore or planned to wear Tea Party shirts and/or EIW buttons when voting. JA 77-78,

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[4] None of the organizations forming EIW "endorse[d] a candidate or ballot issue in the November 2010 Election." Pet. App. D-2, E-2-3.

¶¶ 72-75. For instance, the Executive Director of MVA, Petitioner Andrew Cilek, entered his polling place in Hennepin County wearing a t-shirt made by the Tea Party Patriots. *Id.* at 115, ¶¶ 10-11. The shirt featured a small Tea Party logo, a larger "Don't Tread on Me" message, and an image of the Gadsden Flag. JA 114, ¶ 5; *see also* Pet. App. H-1 (representation of Tea Party shirts). Cilek also wore a small "Please I.D. Me" button. JA 115, ¶ 9.

When Cilek entered the polling place, an election worker told him he could not vote unless he covered or removed the shirt and button. Cilek refused and left. *Id.* at 115, ¶ 10. A while later, he tried again to vote, but was once more denied entry to the polling place and told not to come back a third time. *Id.* at 115, ¶ 11.

Several hours later, Cilek made a final attempt to enter the polling place. This time, election officials allowed him to vote. However, as he did so, an election judge recorded Cilek's name and address for possible prosecution for wearing the "Don't Tread on Me" shirt and the button. *Id.*

Another citizen who wore a Tea Party Patriot shirt on election day was told to cover the shirt by a poll worker as he was casting a ballot, and was threatened with prosecution if he did not comply. JA 78, ¶ 73. Other citizens who wanted to wear Tea Party shirts and/or buttons when voting refrained from doing so out of fear of prosecution under Section 211B.11(1). *Id.* at 79, ¶¶ 79-82.

B. Procedural History

1. Initial Proceedings

Just prior to the November 2010 election, MVA, and entities that are no longer parties to this

litigation, filed a complaint against Ramsey County election officials and the Minnesota Secretary of State. JA 8-33. The complaint alleged that Minn. Stat. § 211B.11(1) violated the First Amendment on its face because it failed to advance legitimate interests and/or was overbroad. *Id.* at 30, ¶ 117. The complaint sought a declaration that "Minn. Stat. § 211B.11 is facially unconstitutional" and an order enjoining its enforcement. *Id.* at 32, ¶¶ C, D. Several weeks after the 2010 election, MVA filed an amended complaint that included additional facts related to the Policy and the enforcement of Section 211B.11(1) during the 2010 election. JA 63-92. The district court read the amended complaint to allege that Section 211B.11 is facially unconstitutional under both the United States and Minnesota Constitutions. Pet. App. E-8.

The Government soon filed a motion to dismiss the case under Federal Rule of Civil Procedure 12(b)(6). Upon review, the district court held that Section 211B.11(1) was constitutionally valid under the First Amendment and dismissed the facial claim. Pet. App. E-10-14, E-28-30. The court concluded that a ban on apparel "expressing political ideology or beliefs, even those unrelated to a candidate or ballot question," falls "within the [statute's] legitimate sweep." *Id.* at E-29. The court similarly dismissed MVA's as-applied First Amendment claim, holding that "prohibiting apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of 'maintain[ing] peace, order, and decorum' at the polls." Pet. App. E-18 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). MVA appealed.

2. Appellate Proceedings

During argument in the Eighth Circuit, the Government embraced the broad nature of the ban on "political" apparel. It conceded that Section 211B.11(1) is not limited to Tea Party apparel and that it prohibits items naming other organizations, like the "Chamber of Commerce" and the "AFL-CIO." Oral Argument at 19:48, *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (No. 11-2125). The Eighth Circuit also recognized that the political apparel ban reaches beyond campaign-related items. Pet. App. D-3, D-9-10. Nevertheless, it upheld the provision on the ground that it constitutionally advances the Government's interest in "peace, order, and decorum" at polling places. Pet. App. D-8-10. The Eighth Circuit also remanded MVA's as-applied claims for further factual development. *Id.* at D-10; D-12.

Judge Shepherd dissented from the majority's analysis of the facial claim. Pet. App. D-15-19 (Shepherd, J., conc. in part, dis. in part). He declared it impossible to

> see how this broad restriction, which prohibits a voter from wearing any political emblem, insignia, or slogan that is unrelated to an issue or candidate on the ballot, would rationally and reasonably help maintain the "peace, order, and decorum" of the polling place, "protect [ ] voters from confusion or undue influence," or "preserv[e] the integrity of [Minnesota's] election process."

Id. at D-18 (Shepherd, J., conc. in part, dis. in part). Maintaining the same theme, the dissent forcefully

rejected the idea that "the presence of a passive and peaceful voter who happens to wear a shirt" promoting the "'American Legion,' 'Veterans of Foreign Wars,' 'AFL-CIO,' 'NRA,' 'NAACP,' or the logo of one of these organizations (all of which have actively participated in the political process)" would disrupt or otherwise harm voters. *Id.* at D-18 n.7 (Shepherd, J., conc. in part, dis. in part).

MVA subsequently filed a petition for a writ of certiorari. Petition for Writ of Certiorari, *Minnesota Majority v. Mansky*, No. 13-185, 2013 WL 4027040 (U.S. Aug. 5, 2013). The Government opposed this petition on the ground that the "as-applied challenge [was] still pending." Opposition to Petition for Writ of Certiorari, *Minnesota Majority v. Mansky*, No. 13-185, 2013 WL 6021145, at *9-11 (U.S. Nov. 8, 2013). The Court denied certiorari, and MVA proceeded with the as-applied claims against Section 211B.11(1) in district court. Pet. App. B-1-34. Relying primarily on the Eighth Circuit's prior decision finding the statute constitutional, the district court eventually granted the Government's motions for summary judgment on the as-applied claims. *Id.* at B-33. MVA appealed once more, but limited its as-applied arguments to the prohibition on Tea Party shirts. Pet. App. A-1-7. The Eighth Circuit affirmed summary judgment in favor of the Government on this issue, creating a final judgment. *See id.* at A-7.

Once more, MVA filed a Petition for Certiorari, asking this Court to decide whether Section 211B.11(1) is facially unconstitutional under the First Amendment. On November 13, 2017, the Court granted the Petition.

SUMMARY OF ARGUMENT

The prohibition on "political" apparel in Section 211B.11(1) is unconstitutional under the First Amendment overbreadth doctrine because it bans and penalizes substantial amounts of passive political speech. To state the statute's reach is to confirm its unconstitutionality. The law prohibits and potentially criminally punishes every variety of political speech on clothing, from that which simply names a political group, to messages supporting political causes, to ideological or party references, to messages about current issues. Pet. App. E-13, 15, 18, 25, 27, 28, 29 (district court findings on scope of the statute); Pet. App. A-6 (Eighth Circuit declares: "all political material is banned"); 2011 Brief of Appellee Ritchie at 10 n.1 ("[T]he class of 'political' items that section 211B.11 restricts are those items that fit within the category of political *speech* within a First Amendment context."). Further, the broad and amorphous nature of the term "political" allows election officials to mistakenly or purposefully silence other forms of protected speech, such as religious or environmental messages.

The First Amendment needs breathing space to flourish, *National Ass'n for Advancement of Colored People* (*NAACP*) *v. Button*, 371 U.S. 415, 433 (1963), but Section 211B.11(1) positively suffocates it. The statute establishes political speech "safe zones" throughout the state on election days and for 46 days prior to the election at absentee voting offices. No conceivable governmental interest justifies such an expansive freeze on political speech. *Jews for Jesus*, 482 U.S. at 575; *Grace*, 461 U.S. at 187 (Marshall, J., conc. in part, dis. in part). Indeed, given Section

211B.11(1)'s remarkably deep intrusion into passive political speech, the statute is overbroad and unconstitutional even if it can be constitutionally applied to prohibit the Tea Party shirts and EIW buttons worn by MVA members and others.

Certainly, the Government's interest in "peace" and order" at polling places cannot sustain the statute. The wearing of clothing containing political messages and symbols is inherently "nondisruptive." *Jews for Jesus*, 482 U.S. at 576. Moreover, the statute bans far more than items bearing "fighting words" or similarly provocative material. It prohibits "all" politically expressive clothing, including that which peacefully conveys common political affiliations or aspirations. Pet. App. E-29 (the statute bans expressions of "political ideology or beliefs, even those unrelated to a candidate or ballot question"). Such a wide-ranging restriction on passive speech is unrelated to "peace and order." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969).

Similarly, Section 211B.11(1) fails to advance the governmental interest in protecting voters from "confusion" and "undue influence." The statute restricts t-shirts that make no attempt to persuade voters to take any action, such as those that merely name a political group or ideology. Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part). There is no danger of undue influence here.

The Government is likely to point to *Burson v. Freeman*, 504 U.S. 191, for support. But *Burson* is inapposite because it did not involve a restriction on voters' ability to silently wear expressive clothing while voting; it involved a restriction on active

campaigning. The *Burson* plurality held only that "requiring *solicitors* to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise." 504 U.S. at 211 (emphasis added).

Since *Burson* does not control here, Section 211B.11(1) must stand or fall based on its ability to advance the Government's interests in regulating elections. It falls. No interest justifies a law broadly banning *all* politically expressive apparel. The statute is therefore unconstitutionally overbroad whether or not polling places are a non-public forum. *Jews for Jesus*, 482 U.S. at 576. Citizens cannot constitutionally be compelled to give up their right to passively speak on political topics through a t-shirt at the polling places any more than in airports, *id.*, courthouses, *Cohen v. California*, 403 U.S. 15, 26 (1971), or schools, *Tinker*, 393 U.S. at 505-06, 514.

To save the statute, the Government may propose a construction that it believes would narrow its reach. But none exists. The law cannot plausibly be construed to ban only political items that may "influence" voters, given the provision's broad language, the statutory context, and the Government's interpretations and concessions. *Jews for Jesus*, 482 U.S. at 575-76. Moreover, a construction that allows the statute to prohibit all political advocacy on apparel is insufficiently tailored to the goal of preventing undue influence, overbroad, and unconstitutional in its own right.

There is no form of speech as protected as political speech and no medium of public expression that is as peaceful and unobtrusive as messages on clothing. The First Amendment cannot tolerate a law that penalizes and deters all political expression communicated through clothing—even in polling places. *Jews for Jesus*, 482 U.S. at 576 ("the wearing of a t-shirt or button that contains a political message . . . is still protected speech even in a non-public forum"). Section 211B.11(1) is facially unconstitutional.

ARGUMENT

I.

MINN. STAT. § 211B.11(1) BROADLY BANS ALL POLITICALLY EXPRESSIVE APPAREL

The First Amendment not only protects against violations of a particular individual's free speech rights; under the "overbreadth doctrine," it also guards against far-reaching laws that threaten the free speech rights of large segments of society. *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984). Section 211B.11(1) violates this doctrine because it punishes *all* political speech that can be conveyed through the passive medium of personal apparel. Pet. App. A-6 ("all political material is banned").

A. First Amendment Principles

The First Amendment to the Constitution declares that "Congress shall make no law . . . abridging the freedom of speech." This guarantee applies, of course, not only to oral communications, but also to written or symbolic expression. Speech silently conveyed through writing and symbols on t-shirts, buttons, and hats is just as protected as a literal oration. *Jews for Jesus*, 482 U.S. at 576; *Cohen*, 403 U.S. at 23-24 (imprint on jacket was a constitutionally protected "utterance"); *Tinker*, 393 U.S. at 505-06 (wearing a black armband is "akin to 'pure speech'" and "entitled to comprehensive protection").

In considering whether a restriction on protected speech violates the First Amendment, this Court has employed several different approaches. Here, the Government will likely urge the Court to utilize the public forum doctrine, and standards associated with the doctrine, in deciding whether Section 211B.11(1) goes too far. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). This is not necessary.

1. Forum Analysis

To be sure, in some cases, First Amendment scrutiny depends (at least in part) on whether a challenged speech restriction applies in a public or non-public forum. *Id.* In a "traditional public forum," such as a public sidewalk, or in a Government-"designated public forum," speech restrictions are subject to strict scrutiny. The government "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve

that end." *Id.* at 45. In some cases, content-neutral regulations that impose reasonable time, place and manner limitations on speech may be permissible in public forums, if they are narrowly drawn to achieve a substantial governmental interest, and leave open ample alternative channels of communication. *Id.*; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

At the same time, this Court has recognized that the government may sometimes restrict speech in non-public forums—even when the restriction is content based—as long as the regulation is "reasonable in light of the purpose served by the forum" and "viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *see also Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-29 (1995).

2. Content-Based and Political Speech Restrictions Are Subject to Strict Scrutiny

The public forum doctrine has never been the *exclusive* analytical device for reviewing free speech claims. In fact, in many cases, the type of review depends on the nature of the speech restriction, not the locus of its operation. For instance, the Court has repeatedly declared that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (It is usually "dispositive to conclude that a law is content-based and, in practice,

viewpoint-discriminatory."); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (same); *Cohen*, 403 U.S. at 18 (The "State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-25 (1991) (Kennedy, J., concurring); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated . . . ."). A law is content-based and subject to strict scrutiny when it is content-based "on its face" or when its purpose is content-based. *Reed*, 135 S. Ct. at 2228. This includes laws that forbid "'discussion of an entire topic.'" *Id.* at 2230 (quoting *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)).

The Court's precedent also singles out political speech—"expression of editorial opinion on matters of public importance"—for individualized, robust protection. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375-76 (1984). Political speech is "central to the meaning and purpose of the First Amendment." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 329 (2010); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("at the core of what the First Amendment is designed to protect") (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)). For this reason, the Court has said that political speech is entitled to the "fullest and most urgent application" of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam). This typically means review under strict scrutiny tests. *Federal Election Comm'n v. Wisconsin Right To Life, Inc.* (*WRTL*), 551 U.S. 449, 464 (2007); *see generally Buckley*, 525 U.S. at 206

(Thomas, J., concurring) (cataloguing political speech cases adjudicated under strict scrutiny standards). A political speech restriction must be "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *see also Cohen*, 403 U.S. at 21-26 (applying heightened scrutiny to a criminal penalty arising from a political message displayed in a courtroom corridor).

3. Facial Challenges Under the Overbreadth Doctrine

The foregoing principles may come into play in either a facial or as-applied First Amendment challenge. When plaintiffs allege that a statute is unconstitutional on its face, they generally must show that the law lacks a "plainly legitimate sweep," *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in the judgment) (internal quotation marks omitted). However, the First Amendment "overbreadth doctrine" permits a second type of facial challenge. It allows "an individual whose own speech or conduct may be prohibited" to "challenge a statute on its face 'because it threatens [the free speech rights of] others.'" *Jews for Jesus*, 482 U.S. at 574; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

The overbreadth doctrine responds to "the threat [that] enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected

speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id.* (citation omitted); *see also Jews for Jesus*, 482 U.S. at 574. Thus, "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Munson Co., Inc.*, 467 U.S. at 958. By allowing a plaintiff to challenge a law because it endangers the free speech rights of others, the overbreadth doctrine ensures that the First Amendment has "'breathing space to survive.'" *WRTL*, 551 U.S. at 468-69 (quoting *NAACP v. Button*, 371 U.S. at 433).

Because the First Amendment overbreadth doctrine is "strong medicine," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), it is generally employed to facially invalidate a statute only (1) when its overbreadth is "substantial" in "relation to the statute's plainly legitimate sweep," and (2) where the law is not readily susceptible to a limiting construction. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008); *Broadrick*, 413 U.S. at 613, 615. This understanding derives from the doctrine's purpose. "While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *New York v. Ferber*, 458 U.S. 747, 772 (1982). In applying this framework, the Court may consider the extent to which a law "delegates overly broad discretion to the decisionmaker." *Forsyth County, Ga.*

v. Nationalist Movement, 505 U.S. 123, 129 (1992); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991) (Overbroad laws raise "a concern . . . that the legislature . . . has created an excessively capacious cloak of administrative or prosecutorial discretion, under which discriminatory enforcement may be hidden.").

B. Minn. Stat. § 211B.11(1) Bans a Vast Amount of Peaceful, Passive, Protected Speech

MVA's facial challenge to Section 211B.11(1) arises under the First Amendment overbreadth doctrine. The first step in analyzing such a claim is "to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). The Court must "ascertain whether the enactment reaches a substantial amount of constitutionally protected conduct." *Boos v. Barry*, 485 U.S. 312, 329 (1988). "The [government's] authoritative constructions of the [law], including its own implementation and interpretation of it" are pertinent in gauging the scope of a challenged speech restriction. *Forsyth County, Ga.*, 505 U.S. at 131.

1. Section 211B.11(1) Burdens an Astounding Amount of Protected Political Speech

On its face, Section 211B.11(1) is a content-based restriction on political speech, *Burson*, 504 U.S. at 197, a trait that places it in a precarious position from the start. *Reed*, 135 S. Ct. at 2226 (content-based restrictions are presumptively invalid). But the

statute's most remarkable—and most troubling—feature is its capacity to penalize all protected political speech. *Consolidated Edison Co.*, 447 U.S. at 537.

The political apparel ban in Section 211B.11(1) prohibits not only items that expressly advocate for or against candidates and issues (whether on the ballot or not),[5] it prohibits even the most general references to political issues, beliefs, and associations. Pet. App. E-25 (if people wear apparel that "express[es] a political statement they may be asked to cover or remove the item"); *id.* at E-29 (statute bars material expressing "ideology or beliefs"); Pet. App. I-1-2 (Policy); Opp. at 15.

Apparel messages referring to social, economic, immigration, healthcare, military, foreign affairs, taxation, or other political concerns fall within the statute's prohibited zone. Pet. App. E-27 ("innumerable issues" within statute's reach); *id.* at E-15 (The "Policy applies to [items] expressing all manner of political views."). The same is true of apparel communicating a political "ideology," *id.* at E-29, such as a shirt declaring, "Fiscal Responsibility, Limited Government, Free Markets." *Id.* at E-17-18 (district court reviews Tea Party shirts and concludes

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[5] In official election guidance documents, the Minnesota Secretary of State observed that Section 211B.11 bars all "partisan references" in a polling place. *See* Appendix A to Declaration of Gary Poser, dated October 29, 2010, DE 20. As a result, there would appear to be no expiration date on the statute's prohibition of candidate- and issue-based apparel. A shirt referring to former President Obama's 2008 Democratic Party candidacy would appear to be just as illegal, as "partisan" material, as one supporting a current candidate.

the statute bars "apparel that expresses support for a political ideology").

Section 211B.11(1) reaches farther still. It prohibits items referring to the name of any organization linked to politics. Pet. App. I-1-2. It bars clothing bearing the names and/or logos of the "AFL-CIO," "Chamber of Commerce," "MoveON.org," the "Tea Party" and "so on." There is no logical stopping point. "[A] shirt displaying . . . the words 'American Legion,' 'Veterans of Foreign Wars,' . . . 'NRA,' 'NAACP,' or the logo of one of these organizations (all of which have actively participated in the political process)" comes within the reach of Section 211B.11(1). Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part).

The statute also bans "any item containing the name of a political party in Minnesota," whether or not that party has any affiliated candidates on the ballot and whether or not it has endorsed any candidates. Pet. App. I-1-2 (Policy). The Government's enforcement of the provision against voters wearing shirts associated with the North Star Tea Party provides an example. The Tea Party is not a political party and did not field or endorse candidates during the 2010 election. JA 40-41, ¶¶ 8-9, Pet. App. E-18. Yet the political apparel ban barred Tea Party shirts at polling places. Pet. App. I-2; JA 115, ¶ 10. The provision would similarly prohibit apparel featuring the peace-dove symbol of the Peace and Freedom Party, a party that also fielded no candidates in Minnesota's 2010 election. Pet. App. I-2.

As Respondent Mansky put it, Section 211B.11(1) "prevents *any politicization* from entering the polling place." 2011 Brief of Appellee Mansky at 14 (emphasis

added). The Minnesota Secretary of State holds a similar view: "the class of 'political items' that section 211B.11 restricts are *those items that fit within the category of political speech within a First Amendment context*." 2011 Brief of Appellee Ritchie at 10 n.1 (emphasis added). These statements confirm the extraordinarily broad nature of the political apparel ban. It prohibits "all manner of political views," Pet. App. E-15, "any political viewpoints," *id.* at E-28, and "innumerable issues." *Id.* at E-27.

Political speech is vital to the health and success of a constitutional republic, *Buckley v. Valeo*, 424 U.S. at 14 ("Discussion of public issues" is "integral to the operation of the system of government established by our Constitution."), and expressive clothing plays an important role in American political discourse. *See, e.g., Tinker*, 393 U.S. at 513-14. *Tobey v. Jones*, 706 F.3d 379, 387-92 (4th Cir. 2013) (citizen stated a viable First Amendment retaliation claim based on the TSA's punitive reaction to a display of the text of the Fourth Amendment). While slogans on apparel may be brief, "powerful messages can sometimes be conveyed in just a few words." *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017). Section 211B.11(1) utterly silences peaceful political discourse on days when it should be celebrated, or at least tolerated.

2. The Provision Threatens Other Forms of Protected Speech

The statute's ability to shut out all political expression on apparel is sufficient to classify it as a dangerously broad speech restriction. But the provision threatens other forms of protected speech as well, due to the indefiniteness of the term "political," and the discretion which polling officials have to

define and apply that term. More than 30 years ago, this Court suggested that sayings like "Jesus Saves," "Abortion is Murder," and "Right to Choose," are *non-political* speech. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984). Yet, it is hardly a stretch to believe that many would see such speech as "political" today. A shirt that says "Life Begins at Birth" or "Family Research Council" and which a person wears as a religious statement could be perceived as "political" by a polling official and banned under Section 211B.11(1). Clothing with scientific or environmental messages would likely meet the same fate. A hat that says "Climate Change is Real" could, and very likely would, be considered "political." Patriotic clothing is not immune. Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part) (noting that a "shirt bearing an American flag or the Star of David" would likely be considered a prohibited "political" item). To some, an image of a national flag is a "political" statement, leading to the very real possibility that the statute could prevent American flag images at American elections. *Id.*; *see also Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 775, 778-79 (9th Cir. 2014) (upholding a prohibition on an American flag shirt at a school).

None of this is hyperbole. Reports abound of polling officials applying political apparel bans to turn away or penalize voters for wearing "political" t-shirts at polling areas. In one 2008 case, a poll worker temporarily prevented a citizen from voting because she was wearing an "Alaska" souvenir t-shirt that the

poll worker construed as support for Sarah Palin.[6] In 2014, a citizen attempting to vote in Georgia was ordered to remove an "NRA Instructor" hat because polling place officials associated the message with certain parties on the ballot.[7] In another well-known incident, polling officials stopped Massachusetts Institute of Technology students because officials thought their "MIT" shirts campaigned for Mitt Romney. James J. Woodruff II, *Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much*, 65 Mercer L. Rev. 331, 332 (2014). More recently, during last year's national election, Arkansas election officials made clear that shirts "reminiscent of a party," like "I miss Bill" or "Reagan/Bush" shirts would not be allowed at the polling place.[8]

The amount of protected speech that Section 211B.11(1) can plausibly ban—indeed, criminalize—is truly staggering. The statute suppresses the entire realm of political speech that can be passively conveyed through personal apparel. Pet. App. A-6 ("all political material is banned"); 2011 Brief of Appellee Mansky at 13 (conceding the law "bans all political

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[6] Jennifer Latson, *Houstonian wearing Alaska T-shirt nearly denied a vote*, Houston Chronicle (Nov. 4, 2008), http://www.chron.com/neighborhood/cyfair-news/article/Houstonian-wearing-Alaska-T-shirt-nearly-denied-a-1789897.php.

[7] Jessica Chasmar, *NRA demands Georgia county's elections board reverse ban on pro-gun clothing*, Wash. Times (Oct. 29, 2014), https://www.washingtontimes.com/news/2014/oct/29/nra-demands-georgia-countys-elections-boar/.

[8] Kathryn Gilker, *What Can You Bring To A Polling Place: Cellphones, Political T-shirts, Children?*, 5NEWS (Nov. 7, 2016), http://5newsonline.com/2016/11/07/what-can-you-bring-to-a-polling-place-cellphones-political-t-shirts-children/.

speech"). The provision is also a malleable tool for punishing a broad range of other types of speech. *See* JA 56, ¶ 9 (Respondent Mansky acknowledges that a Minnesota Vikings shirt could be banned). Given this reality, it is of little moment that the lower courts held the statute could constitutionally prohibit a few Tea Party Shirts and an EIW button worn by some of the MVA members in this case. Those items are a drop in the bucket of protected political speech punished by the statute.

Wearing inscribed clothing is a time-honored and affordable way for the average citizen to peaceably speak out about politics and other issues, *Picray*, 916 P.2d at 601 n.12, but Section 211B.11(1) runs roughshod over this passive and ordinary form of political expression and turns it into a punishable act. Minnesotans will naturally respond by refraining from wearing politically expressive (or arguably politically expressive) shirts, hats, and other clothing, causing freedom of speech to suffer. *Hicks*, 539 U.S. at 119; *Broadrick*, 413 U.S. at 612 (An overbroad statute "may cause others not before the court to refrain from constitutionally protected speech or expression.").

Indeed, the speech-chilling effects of the statute extend beyond the millions of people who vote on election day, as it forbids political apparel for 46 days before the election in at least 87 absentee voter areas in a variety of public buildings. Section 211B.11(1). Moreover, as a practical matter, the statute's impact does not end at polling places. Most people barred from wearing politically expressive clothes when voting will not put them on for the trip to the polls, or at all, on election day. *See, e.g.*, JA 64, ¶ 2; JA 77, ¶ 72; JA 79, ¶ 77. The overbreadth doctrine is designed to

prevent this type of deterrent to free speech. *Munson Co.*, 467 U.S. at 958.

II.

NO CONCEIVABLE INTEREST SUPPORTS A BAN ON ALL "POLITICAL" APPAREL

To determine whether the broad political apparel ban in Section 211B.11(1) passes constitutional muster, this Court need not decide whether polling places are a public or non-public forum, or whether the public forum doctrine is irrelevant in this context.[9] Because "no conceivable governmental interest" supports the criminalization of the entire class of political messages that can be conveyed through clothing, the statute's ban on political speech is unconstitutional under every possible test. *Jews for Jesus*, 482 U.S. at 576 ("[T]he wearing of a T-shirt or button that contains a political message . . . is still protected speech even in a nonpublic forum."); *Grace*, 461 U.S. at 187 (Marshall, J., conc. in part, dis. in part).

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[9] If it becomes necessary to weigh and potentially apply a more formulaic approach, MVA contends that Section 211B.11(1) is subject to strict scrutiny, regardless of forum analysis, because the statute is a content-based restriction on political speech. *Burson*, 504 U.S. at 207; *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1446 (2014); *Citizens United*, 558 U.S. at 330. The statute would be unconstitutional under this test for the reasons outlined in the following sections, namely, because the ban on political apparel is not sufficiently tailored to the Government's objectives.

A. The State's Interest in Fair and Orderly Elections Cannot Justify a Total Political Apparel Ban

The Government may claim that its interest in peaceful and orderly elections justifies a total ban on political apparel. This position seems to flow from the belief that allowing political expression at polling places could disrupt the voting process. While this concern might have some traction in cases dealing with *active* political solicitation, *Burson*, 504 U.S. at 211, it falls flat as applied to passive political speech communicated through apparel. After all, this Court has already held that this form of expression is "*non-disruptive* speech." *Jews for Jesus*, 482 U.S. at 576 (emphasis added). Moreover, unlike signs, speech communicated through personal apparel does not take up physical space. It is impossible to see how a "nondisruptive" and physically unobtrusive form of speech can disrupt voting, and "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

Not surprisingly, there is no evidence in this case that the t-shirts or other apparel worn by MVA or other voters caused a "disruption" in a polling place. The only polling place disruptions in this case arose from polling officials' attempt to *enforce Section 211B.11(1)* to suppress political speech. As is all too often the case, it is Government reactivity, not speech itself, that causes a commotion. *Cox v. Louisiana*, 379 U.S. 536, 543-44 (1965) (police fired tear gas to disperse a peaceful civil rights demonstration). In the voting context, requiring election officials to police apparel disrupts and delays voting. Thus, decorum at

polling places is advanced by *allowing* political apparel, not by banning it. Woodruff, 65 Mercer L. Rev. at 368. In cases of actual voter disruption, Minnesota's election code gives the Government plenty of tools to restore and maintain order. Minn. Stat. § 204C.06 (restricting access to polling places, lingering, and disorderly conduct). It need not punish peaceful speech "in order to keep the peace." *Texas v. Johnson*, 491 U.S. 397, 410 (1989) (citing *Boos v. Barry*, 485 U.S. at 327-29); *see also Grace*, 461 U.S. at 186.

The Government may also assert that the statute serves its interest in protecting voters from confusion and undue influence. But this rationale is as inapt as one premised on "order," given the wide reach of the "political" apparel prohibition. The ban is not limited to messages of "express advocacy" for or against a candidate or a ballot proposal; *i.e.*, messages that urge others to "vote for," "elect," or "support." *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 248-49 (1986). It bars references to political groups and philosophies that contain no advocacy or "explicit directive." *Id.* As Eighth Circuit Judge Shepherd observed, a t-shirt merely naming the AFL-CIO or Chamber of Commerce does not solicit or influence votes, and yet it is barred. Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part). Such a restriction does not reasonably advance the Government's interest in fair elections.[10] *Id.*; *Picray*,

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[10] The Government would fare no better if it claimed that its goal was to shield voters from "distractions" at the polling place. This is not a legitimate interest, as it would justify almost every speech restriction in every situation and thus swallow the right of free expression. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 201-11 (1975) ("Much that we encounter offends our

916 P.2d at 329 ("The silent expression of political opinion is not coercive. To the extent that such expression in the polling place might affect the votes of others, that influence cannot be deemed constitutionally 'undue.'"); Kimberly J. Tucker, *"You Can't Wear That to Vote": The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. Marshall L. Rev. 61, 81 (2006) ("A button worn during the brief period that a voter is actually in the polling place should not be viewed as intimidating or coercing other voters.").

Citizens are subjected to all sorts of passive speech on clothing, on the day of an election and throughout the year, in the ordinary course of life. Voters can ignore such influences, if they wish, or they can choose to pay attention. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (Free speech "embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad."). The choice is theirs, not the Government's. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read . . . .").

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esthetic, if not our political and moral, sensibilities," but "the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" (citation omitted)). In any event, Section 211B.11 bans not just potentially "distracting" political apparel—such as (perhaps) florescent colors, large print, or overtly provocative messages. It bans all politically expressive apparel, regardless of size, color or any other characteristic that might potentially "distract." Small buttons, small print, grey shirts, bland references to mainstream political groups—all are just as prohibited as blatantly provocative expressive clothing.

It is no different at polling places. "The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech," much less for totally barring passive political speech. *Brown v. Hartlage*, 456 U.S. at 60; *see also Vanasco v. Schwartz*, 401 F. Supp. 87, 100 (S.D.N.Y. 1975), *aff'd mem.*, 423 U.S. 1041 (1976) ("[W]hen the State through the guise of protecting the citizen's right to a fair and honest election tampers with what it will permit the citizen to see and hear even that important state interest must give way to the irresistible force of protected expression under the First Amendment.").

Ultimately, it is hard to escape the impression that the ban on politically expressive clothing hinges (at least in part) on fear of how people may react to such clothing. It devolves "to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis." *Johnson*, 491 U.S. at 408. But "the fact that society may find speech offensive is not a sufficient reason for suppressing it.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)). Indeed, it is "a bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414. This principle is especially strong when the speech at issue is passively conveyed through "nondisruptive" means, such as clothing. Whether worn at a college campus, an airport, or a polling place, clothing that expresses political ideas and affiliations may not be banned because of the possibility that a few viewers may be so "triggered" by

the messages that they cause a disturbance. The First Amendment will not bow to a "hecklers' veto" over political clothing any more than it will bow to one over political picketing. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (political speech cannot be restricted "simply because bystanders object to peaceful and orderly" expression).

B. The Statute's Vague Prohibition Invites Expansive Enforcement and Viewpoint Discrimination

Section 211B.11(1) is further undermined by its capacity to give poll workers broad and unpredictable discretion to suppress free speech. Such discretion extends the reach of the statute and invites viewpoint discrimination.

Enforcement of Section 211B.11(1) requires someone to decide what material worn at a polling place is "political" and forbidden, and which is non-political and allowed. The Election Day Policy recognizes that poll workers have effectively unreviewable authority to decide whether apparel is "political" and prohibited by the statute. *Jews for Jesus*, 482 U.S. at 576. Given the malleable nature of the word "political" and the reality that there is almost no issue, cause, or group in America that cannot be linked to politics at some level, Pet. App. E-27, the range of possible discretionary applications of the law is almost limitless. *See* Pet. App. I-1-2. It is hard to think of any social, religious, or environmental message that is *certainly* beyond the poll workers' discretionary power to suppress "political" material.

The poll workers' discretion to apply the vague term "political" not only enables them to broaden the

statute's reach, it raises a very real danger of viewpoint discrimination, as polling place officials are free to apply the "political" kiss of death to disfavored messages. Any statute that allows Government officials to selectively muzzle a wide array of protected, non-disruptive speech is a law that the First Amendment cannot tolerate. *Forsyth County*, 505 U.S. at 129; *City of Chicago v. Morales*, 527 U.S. 41, 52-60 (1999) (provision vaguely barring "loitering" for "no apparent purpose" held unconstitutional in part due to the discretion it gave police to apply the prohibition).

The "political" apparel ban in Section 211B.11(1) is grossly over-inclusive and dangerously standard-less. It sweeps in and prohibits every type of political message that can be passively conveyed on personal apparel, and invites interference with other types of speech. In so doing, the law goes far beyond what is needed to maintain order and fairness at elections, and does not come close to being "narrowly" tailored to those objectives. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 735 (2011).

C. *Burson* Does Not Support the Statute

To sustain Section 211B.11(1), the Government will point to *Burson*. But *Burson* provides no support because that case did not involve a law restricting citizens' ability to wear political apparel when voting. It dealt with restrictions on active campaigning for candidates and issues on a ballot. 504 U.S. at 193. The case was brought by a campaign worker who wanted to communicate with voters as they went into polling places. The plaintiff objected to a statute that created a "campaign free zone" in which one could not engage

in "solicitation of votes" or the "display or distribution" of "campaign materials" near a polling place. *Id.* at 193-94. Characterizing the statute as a "facially content-based restriction on political speech in a public forum," a plurality of the Court applied "exacting scrutiny." *Id.* at 198. It held that the law served compelling interests in seeking to protect against voter "fraud" and "intimidation." *Id.* at 199; *id.* at 198 n.4. The plurality further concluded that the statute served these interests because of the nation's election history. *Id.* at 206. Finally, it held that a 100-foot campaign-free zone was sufficiently tailored. *Id.* at 209-10. Justice Scalia concurred in the result, but on different grounds. *Id.* at 216 (Scalia, J., concurring in the judgment).

Burson held that the First Amendment does not forbid creation of an area outside polling places that is off-limits to campaigning or solicitating. *Id.* at 211. The decision did *not* hold that the Government may constitutionally bar citizens from silently wearing campaign-related clothing while voting, much less that it may prohibit apparel bearing more general political messages. It therefore does not control or significantly guide this dispute. Nothing in *Burson* prevents this Court from concluding that banning all political apparel is insufficiently connected to the goal of free and orderly voting.

D. The Statute Has No Legitimate Sweep or Is Substantially Overbroad

In the end, resolving overbreadth claims involves comparing a law's impermissible applications with those that are plainly legitimate to see if the former substantially exceeds the latter. *Washington State Grange*, 552 U.S. at 449 n.6. Here, it is difficult to find *any* plainly legitimate range of application for Section 211B.11(1), given the highly protected nature of political speech and the fact that political apparel is passive, unobtrusive, and not disruptive. Silently wearing clothing with political slogans and names while voting is simply not "incompatible with the normal activity" in polling places. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (silent protest in library protected); *Jews for Jesus*, 482 U.S. at 576 ("[T]he wearing of a T-shirt or button that contains a political message . . . is still protected speech even in a nonpublic forum.").

Certainly, nothing in America's electoral history suggests that polling places were off-limits to peaceful political speech, or even electioneering, at the time of the First Amendment's adoption. In fact, at the time, elections were conducted by voice voting, *i.e.*, *through speech*, a system that provided ample opportunity for political expression. *John Doe No. 1 v. Reed*, 561 U.S. 186, 225 (2010) (Scalia, J., concurring) ("Any suggestion that *viva voce* voting infringed the accepted understanding of the pre-existing freedom of speech . . . is refuted by the fact that several state constitutions that required or authorized *viva voce* voting *also* explicitly guaranteed the freedom of speech."); Woodruff, 65 Mercer L. Rev. at 360 ("Based

on the election laws and methods of the eighteenth century, it would appear that those who ratified the Free Speech Clause would have found the restriction of passive electioneering offensive.").

Nevertheless, the Government will likely point to (1) campaign-related apparel and (2) the lower courts' application of Section 211B.11(1) to a few Tea Party shirts and an EIW button in an attempt to create some legitimate applications for the statute. But this effort fails. First, MVA does not concede that the First Amendment allows the Government to forbid voters from wearing campaign-related shirts, buttons and the like while voting. Such a restriction is not necessary for fair and orderly voting, or even reasonably related to that interest, given the passive and transitory nature of such expression.

Second, MVA does not believe the First Amendment permits the banning of Tea Party shirts and the EIW button, when peacefully worn without disruptive conduct. *Tinker*, 393 U.S. at 508. While the lower courts held such items could be prohibited—based on the Eighth Circuit's prior ruling sustaining the facial validity of the statute (*see* Pet. App. B-10-12)—that outcome is neither correct[11] nor binding on

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[11] MVA recognizes that it did not appeal the district court's rejection of its as-applied claims based on the EIW buttons. It does not, however, concede that this lower court ruling was correct (it was not), and the district court's findings and rulings are not conclusive in this Court, regardless of case history. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995) ("[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.").

this Court.[12] *Hurley*, 515 U.S. at 567 (In First Amendment cases, this Court has "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court."); *see also Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 501, 503, 510 (1984) (same); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("Law of the case" doctrine cannot bind this Court because a petition for writ of certiorari exposes the entire case to review.). The speech conveyed through the Tea Party shirts and the EIW button is not within the "*plainly* legitimate sweep" of Section 211B.11(1).

Yet, even if it was clear that campaign items and the Tea Party material at issue below could be constitutionally barred, the statute remains unconstitutionally overbroad. Such a small class of (purportedly) proscribable material is dwarfed by the wide range of passive political speech the statute illegitimately burdens. The provision would still impede the vast amount of political expression that has nothing to with either campaigning or the Tea Party. Just as a law is not rendered overbroad because of a few "possibly impermissible applications," when it "covers a whole range of easily identifiable and constitutionally proscribable . . . conduct,'" *Munson Co.*, 467 U.S. at 964-65, a statute that burdens a wide swath of protected speech is not made constitutional simply because the Government can posit a few possibly proscribable situations. *Free Speech Coalition*, 535 U.S. at 255 ("The overbreadth doctrine

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[12] Cases decided on distinctions between as-applied and facial claims are particularly appropriate for holistic review in this Court. *Citizens United*, 558 U.S. at 331.

prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); *United States v. Stevens*, 559 U.S. 460, 475, 480 (2010) (an unconstitutionally broad ban on depiction of animal killings was not rendered constitutional because it might cover some instances of "illegal" and "extreme" animal cruelty).

Section 211B.11(1) either has no legitimate sweep, or its invasion of protected speech is substantial[13] in relation to the little it might legitimately prohibit. Section 211B.11(1) suppresses an entire category of highly protected speech—passive political expression—in a manner that allows for discriminatory enforcement and harmful spill-over into other areas of speech. It accordingly functions as an obvious and unacceptable deterrent to protected speech. *See NAACP v. Button*, 371 U.S. at 433 ("The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions."). In short, in this case, the Government's desire to protect voters from politics operates "to suppress legitimate expression."

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[13] The requirement of "substantial" overbreadth (as opposed to "real" overbreadth) is most proper "where conduct and not merely speech is involved." *Broadrick*, 413 U.S. at 615. This case deals, of course, with pure speech, not conduct. Thus, MVA is entitled to the benefit of any doubt (there should be none) as to whether the statute's overbreadth rises to an unconstitutional level. *Id.*; *see also WRTL*, 551 U.S. at 469 (opinion of Roberts, C.J.) (First Amendment analysis "must give the benefit of any doubt to protecting rather than stifling speech.") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964)).

Burson, 504 U.S. at 214 (Kennedy, J., concurring). The law is overbroad and unconstitutional.[14]

III.

NO POSSIBLE NARROWING CONSTRUCTION CAN SAVE THE STATUTE

To avoid the conclusion that Minn. Stat. § 211B.11(1) is overbroad, the Government will likely propose a narrower, and (in its view) more permissible construction. In particular, it may contend that the statute can and should be limited to political material designed to influence voting. It may hope that this will bring the law under *Burson* or otherwise render it constitutional. Opp. at 21. But this strategy fails. The statute cannot be so limited, and in any event, such a reading would not diminish the law's unconstitutional reach. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 469 n.18 (1987); *Jews for Jesus*, 482 U.S. at 576.

The Court will consider a limiting construction for a statute only if the law is "'readily susceptible' to such a construction." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997). The ban on "political" apparel is not susceptible to any plausible narrowing construction. The "language is plain," *Hill*, 482 U.S.

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[14] Section 211B.11(1) is unconstitutional even if gauged under the standards of review sometimes associated with non-public forums. The law is not a reasonable means for advancing the Government's interest, for the reasons discussed in the text. The statute is also not viewpoint neutral because it gives poll workers unfettered discretion to selectively apply the "political" ban and thus, to prohibit disfavored messages. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-64 (1988) (The danger of "viewpoint censorship" is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.").

at 468, and provides no basis for limiting the prohibition to certain *types* of political material. *Id.*; *Jews for Jesus*, 482 U.S. at 575. The Government has made abundantly clear that it construes the provision as a total ban on "political" apparel. 2011 Brief of Appellee Ritchie at 10 n.1; 2011 Brief of Appellee Mansky at 13.

The Government has specifically acknowledged that the political apparel prohibition covers more than campaign and ballot-related apparel. Pet. App. I-1; (Policy) (noting the statute bars the display of "political or campaign material"); Opp. at 15 (observing that Section 211B.11(1) prevents "both wearing 'campaign' material and 'political' material"); *see also* Pet. App. E-23 (district court opinion "finding" that "the ban on 'political' material is easily understood to include issues beyond those directly applicable to the ballot"). Consequently, any proposal to limit the statute to campaign material is unavailable, as well as implausible. *Republican Party of Minn. v. White*, 536 U.S. 765, 773 (2002) (a government concession helped establish the broad scope of a speech restriction); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 817 (1989) (ruling adopted party concession).

In light of its concessions, the Government may argue for a construction that takes the law a step beyond campaign material, into the area of more general "influential" political advocacy, yet stops there. Opp. at 15. However, this construction is also not possible given the statute's broad and unqualified language, the statutory context, the Policy, and the Government's representations. All of these considerations show that the law bans far more than

apparel urging voters to side with certain political causes. It prohibits, for example, items identifying "a group with recognizable political views" without any accompanying plea for support from voters. Pet. App. I-2. To remake the provision into one that prohibits only advocacy apparel, the Court would have to add new language to the statute. This is improper. The Court "'will not rewrite a . . . law to conform it to constitutional requirements.'" *Stevens*, 559 U.S. at 481. The "political" apparel ban cannot be sensibly "limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable." *Jews for Jesus*, 482 U.S. at 575-76.

Even if Section 211B.11(1) was susceptible to a construction limiting it to political material that seeks to influence voters (it is not), this would not cure the statute's overbreadth and unconstitutionality. *See, e.g., Free Speech Coalition*, 535 U.S. at 256.[15] Such a construction would sweep in not just candidate- and ballot-related messages, but also apparel supporting general political ideologies, goals, and beliefs. As a result, it would still be over-inclusive and

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[15] Again, *Burson* offers no shelter for a ban on potentially "influential" political apparel—or even for a ban on campaign clothing—since it did not consider those forms of passive speech. *Burson* does confirm, however, that any restriction on political speech on apparel is subject to strict scrutiny. *Burson*, 504 U.S. at 207 (a restriction that requires "distinguishing among types of speech" triggers strict scrutiny); *WRTL*, 551 U.S. at 464 (political speech restrictions are subject to strict scrutiny). The Government would have to prove that a prohibition on politically influential apparel is narrowly tailored to serve a compelling governmental interest. *Id.* It could not do so.

insufficiently tailored to the Government's interest in protecting voters from undue influence. *McIntyre*, 514 U.S. at 345-46 (a restriction on political speech "designed to influence the voters in an election" "'involves a limitation on political expression subject to exacting scrutiny'" (citation omitted)); *see also id.* at 357 ("[The State] cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented."); *Hill*, 482 U.S. at 469 n.18 (rejecting limiting proposals that "are either at odds with the ordinance's plain meaning, or do not sufficiently limit its scope"); *Free Speech Coalition*, 535 U.S. at 255 ("The Government may not suppress lawful speech as the means to suppress [purportedly] unlawful speech.").[16]

Apparel reflecting generalized support for political causes or groups is not akin to electioneering, nor does it pose a risk of confusing voters charged with making decisions on specific ballot issues. *Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 785-88 (7th Cir. 1988) (wearing a cap supportive of a union at a polling place is not "objectionable conduct" capable of tainting a union certification election); *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1097-98 (8th Cir. 2005) (wearing a union t-shirt is not prohibited "solicitation" but "the passive inoffensive advertisement of organizational aims and interests.")

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[16] A construction limiting the statute to political material designed to influence others would anomalously allow the Government to prohibit the same black armbands this Court upheld as protected speech on school grounds in *Tinker*, 393 U.S. at 508. Those bands were worn, after all, in part "to influence others." *Morse v. Frederick*, 551 U.S. at 403 (quoting *Tinker*, 393 U.S. at 514).

(quoting *Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577, 585 (8th Cir. 1965)).

The Government is free to ban active political solicitation, campaigning, picketing, and other conduct that engages and detains voters, and it already does. As noted above, under the first, unchallenged, sentence in Section 211B.11(1), it is already unlawful to "display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place . . . to vote for or refrain from voting for a candidate or ballot question." But a law that bans people from wearing clothing supporting political causes as they silently go about their business is not necessary to prevent undue influence and has no support in precedent.[17] *Free Speech Coalition*, 535 U.S. at 245 ("As a general principle, the First Amendment bars the government from dictating what we see or read . . . ."); *see also Grace*, 461 U.S. at 182; *id.* at 185-86 (Marshall, J., conc. in part, dis. in part) (a law prohibiting the peaceful display of political messages on Supreme Court grounds held unconstitutional); *Cohen*, 403 U.S.

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[17] The final blow to such a proposed limiting construction is that it simply piles one vague, discretion-conferring standard—"may influence voters"—on top of another—"political." The line between politically expressive clothing that may influence and that which may not, is "at best, murky." *Jews for Jesus*, 482 U.S. at 576. In all but the most overt cases of vote solicitation, enforcing such a restriction would require polling officials to guess at the motive behind political messages or their potential effect on viewers. *Cf. United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994) (declining to adopt a rule that would "require district courts to speculate as to the motives of, or to ascribe motives to, law enforcement authorities").

at 21 ("F--- the Draft" message on a jacket did not unduly disrupt court proceedings).

It is disconcerting to think that America trusts its citizens to resolve critical political issues by expressing individual choices in the voting booth, yet does not believe Americans are capable of voting their conscience if a political hat or button is present. Indeed, Americans may vote a particular way for any reason or no reason at all. A t-shirt will not destroy democracy. In any event, the cost of a paternalistic impulse in this area is simply too high. *Buckley v. Valeo*, 424 U.S. at 14 (per curiam) ("Discussion of public issues and debate on . . . candidates are integral to the operation" of government.). "The First Amendment does not permit [the Government] to achieve its goal[s] by leaving the principle of elections in place while preventing [speech of] what the elections are about." *White*, 536 U.S. at 788. The First Amendment protects the wearing of politically expressive clothing and other apparel at polling places.

CONCLUSION

The Court should the affirm the value and vitality of free, peaceful, political speech by declaring the third sentence of Minnesota Statute Section 211B.11(1) overbroad and unconstitutional under the First Amendment.

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Minn. Stat. § 211B.11 provides:

211B.11 ELECTION DAY PROHIBITIONS.

Subdivision 1. Soliciting near polling places. A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day. This section applies to areas established by the county auditor or municipal clerk for absentee voting as provided in chapter 203B.

Nothing in this subdivision prohibits the distribution of "I VOTED" stickers as provided in section 204B.49.

Subd. 2. [Repealed, 1997 c 147 s 79]

Subd. 3. Transportation of voters to polling place; penalty. A person transporting a voter to or from the polling place may not ask, solicit, or in any manner try to induce or persuade a voter on primary or election day to vote or refrain from voting for a candidate or ballot question.

Subd. 4. Penalty. Violation of this section is a petty misdemeanor.

No. 16-1435

IN THE

Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE ET AL.,

Petitioners,

v.

JOE MANSKY ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether Minnesota's restriction on individuals wearing "political badges, political buttons, or political insignia" in the polling place is a reasonable, viewpoint-neutral regulation of speech in a nonpublic forum.

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CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that government "shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I.

The provision of Minnesota law regulating conduct inside polling places on election days, Minnesota Statute section 211B.11(1), provides, in relevant part, that "[a] political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."

INTRODUCTION

For democracy to thrive, the right to vote and the integrity of our elections must be jealously protected. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). Accordingly, there can be no serious debate that citizens' speech interests must yield to certain election restrictions enacted to preserve the collective right of self-governance. Section 211B.11(1) of Minnesota Statutes is such a restriction. It prohibits individuals from displaying campaign and political messages only while they are within the polling place. Minnesota's limited prohibition is a reasonable restriction of speech in a quintessential nonpublic forum that protects the integrity of elections by preserving order and decorum in the polling place and preventing voter confusion and intimidation.

Petitioners argue that the First Amendment forum doctrine should be jettisoned and that this Court should

either apply strict scrutiny because Section 211B.11(1) is a content-based restriction of political speech or declare the statute unconstitutional as a total ban on speech. Petitioners' arguments are predicated on a misapplication of this Court's First Amendment jurisprudence. This case can and should be decided by a straightforward application of the forum doctrine. Scrutinized pursuant to this doctrine, Minnesota's restriction on political apparel in the polling place is a reasonable, viewpoint-neutral restriction on speech in a nonpublic forum.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Text and Purpose of Section 211B.11(1)

Like every State, Minnesota has enacted laws to allow voters to cast ballots in peaceful, orderly polling places unhampered by coercive, intimidating, or disorderly conduct. The election day provisions of the Minnesota Fair Campaign Practices Act, Minn. Stat. § 211B.11(1), impose a set of regulations designed to make manifest the Minnesota Voter's Bill of Rights' guarantee that every eligible voter shall "have the right to vote without anyone in the polling place trying to influence [that] vote." Minn. Stat. § 204C.08(1)(10).

First, Section 211B.11(1) prohibits persons from displaying campaign material, posting signs, asking, soliciting, "or in any manner try[ing] to induce or persuade a voter within a polling place * * * to vote for or refrain from voting for a candidate or ballot question." Second,

Section 211B.11(1) proscribes providing "political badges, political buttons, or other political insignia to be worn at or about the polling place" on election days. Finally, Section 211B.11(1)'s third sentence—the only one at issue here—provides that a "political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."

The Act defines "political purposes" to mean "intended or done to influence, directly or indirectly, voting at a primary or other election." Minn. Stat. § 211B.01(6). The scope of Section 211B.11(1) was further crystalized in 2010, when election managers for the counties of Hennepin and Ramsey sent out identical memoranda—the "Election Day Policy"—to city clerks regarding Minnesota's statutory ban on political apparel in polling places. Pet. App. I1-I3.[1] The Election Day Policy enumerated examples of "political" insignia within the scope of the statutory ban:

- Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.
- Any item including the name of a candidate at any election.
- Any item in support of or opposition to a ballot question at any election.
- Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).

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[1] At the same time, the Minnesota Secretary of State distributed the Election Day Policy to county election officials statewide. J.A. 93-94.

- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

Pet. App. I1-I2.

The Election Day Policy directs election judges to ask individuals to conceal or remove prohibited political insignias while inside the polling place. If a voter refuses to do so, the Policy requires election judges to permit the voter to receive a ballot and vote. *Id.* I2-I3. Violators of Section 211B.11(1) are subject to an administrative process in the Minnesota Office of Administrative Hearings ("OAH"). See Minn. Stat. § 211B.32(1)(a). If a complaint is filed, the OAH may dismiss it, issue a reprimand, or impose a civil penalty, *id.* §211B.35(2), and an aggrieved party may seek judicial review, *id.* § 211B.36(5). The OAH may also refer a complaint to a county attorney for potential prosecution. See Minn. Stat. § 211B.35(2); Minn. Stat. § 211B.16. If there is a prosecution, the penalty is a petty misdemeanor, see Minn. Stat. § 211B.11(4), which is not a crime under Minnesota law, see Minn. Stat. § 609.02(4a).[2]

B. Minnesota's Ban on Political Badges, Buttons, and Insignia Has a Long Historical Pedigree

Minnesota's polling-place regulations date to 1893, shortly after Minnesota adopted the secret ballot. At that time, the Minnesota Legislature enacted robust

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[2] There are no OAH proceedings or published cases indicating that anyone has been referred for prosecution for violating Section 211B.11.

regulations designed to prevent corrupt election practices, including the establishment of a 25-foot buffer zone around the polling place within which no person was permitted to solicit votes. See 1893 Minn. Laws, Ch. 4, § 108. Nearly 20 years later, during a special session in 1912, the Legislature passed the Corrupt Practices Act, see 1912 Minn. Laws, 1st Spec. Sess., Ch. 3, which prohibited for the first time the wearing of any "political badge, button or other insignia" within the polling place on election day. *Id.* § 13 (now codified at Minn. Stat. § 211B.11(1)).

Minnesota's ban on political apparel was motivated by advancements in button technology. The celluloid button first appeared during the 1896 presidential election between William McKinley and William Jennings Bryan. Ted Hake, *Encyclopedia of Political Buttons: United States 1896-1972* (1974), at 13. Political buttons quickly became ubiquitous. *Id.*; see also Roger A. Fischer, *Tippecanoe and Trinkets Too: The Material Culture of American Presidential Campaigns 1828-1984* (1988), at 157-160.

The 1912 Corrupt Practices Act was heralded in Minnesota as creating an election environment in which voters could cast their ballots without being urged by campaign workers to wear badges and buttons to the polling place. See *Quiet Primary Greets City Voters Today*, Minneapolis Morning Tribune, 1, September 17, 1912; see also *Wearing Campaign Button Against the Law at Midnight*, Minneapolis Morning Tribune, 6, November 5, 1912 (discussing prohibition on wearing political buttons and describing a particular candidate's button that was "nearer the size of a small billboard than the average campaign button").

Minnesota is not alone in regulating speech inside polling places. All 50 States and the District of Columbia have laws that limit speech to some extent within the polling place.[3] Moreover, most jurisdictions (45 States and the District of Columbia) regulate speech on apparel inside polling places, to varying degrees. Eleven States (including Minnesota) have enacted statutes that prohibit individuals from wearing "political" apparel in the polling place.[4] An additional 16 States plus the District of Columbia have enacted statutes that prohibit individuals from wearing "campaign" apparel in the polling place.[5] Another 10 States have enacted statutes prohibiting some type of "electioneering" in polling places, a term that is usually understood to encompass the wearing of campaign apparel.[6] And eight States permit only voters to wear campaign apparel in the polling place.[7] Although States have varied in their approach, content-based regulations of speech in the polling place, including apparel, are the rule, rather than the exception.

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[3] See Appendix A1-A32.

[4] *Id.* (Colorado; Delaware; Louisiana; Minnesota; Nebraska, New Jersey; New York; North Dakota; Texas; Vermont; Wisconsin).

[5] *Id.* (Alaska; California; Georgia; Hawaii; Indiana; Kansas; Massachusetts; Michigan; Montana; Nevada; New Hampshire; New Mexico; Ohio; South Carolina; Tennessee; West Virginia; Washington, D.C.).

[6] *Id.* (Arkansas; Idaho; Illinois; Missouri; North Carolina; Oklahoma; Pennsylvania; Utah; Washington; Wyoming).

[7] *Id.* (Alabama; Florida; Iowa; Maine; Maryland; Rhode Island; South Dakota; Virginia).

C. Petitioners' Political Apparel

Before the 2010 election, a political group in Minnesota called North Star Tea Party Patriots began distributing shirts created by the national Tea Party Patriots organization. J.A. 66, 72. The "Tea Party" is a well-known political organization in the United States with numerous affiliates in Minnesota.[8] *Id.* 66, 99-101. The Tea Party shirts included the national organization's logo and related political slogans, including "Don't Tread on Me," "Liberty," "We'll Remember in November," and "Fiscal Responsibility, Limited Government, Free Markets." Pet. App. H1; J.A. 72.

Around the same time, a coalition of three organizations in Minnesota—North Star Tea Party Patriots, Minnesota Majority, and petitioner Minnesota Voters Alliance—formed Election Integrity Watch, a "grass roots effort to protect election integrity."[9] J.A. 63, 70. Election Integrity Watch designed and disseminated a button with the phrase "Please I.D. Me" stamped in yellow letters above an image of a panoptic eye. Pet. App. G1. The button listed a toll-free telephone number and website where voters could report "suspicious activity" on election day. *Id.* Election Integrity Watch orchestrated a public campaign encouraging its supporters to wear the button inside the polling place as "a visible

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[8] In July 2010, the U.S. House of Representatives officially recognized a Tea Party caucus, consisting of 52 Republican members and headed by Representative Michele Bachmann from Minnesota's Sixth Congressional District. Pet. App. A6, E17.

[9] All three member organizations of Election Integrity Watch were initially plaintiffs in this action, but only the Minnesota Voters Alliance remains a party.

message to others that you are watching for voter fraud." J.A. 104. Election Integrity Watch explained that the goal of the "Please I.D. Me" campaign was to convey to voters queueing in polling places the false impression that Minnesota law required photographic identification to vote:

> When you go to vote on November 2, wear your Election Integrity Watch button and show your photo ID when you sign-in to vote. While Minnesota does not require an individual to show an ID, *let's act like it does*. This simple act of showing an ID will likely result in a spontaneous reaction from others in line behind you to show their ID as well. Any person in line thinking about committing voter impersonation will likely be dissuaded from doing so. (Although polls show that over 80% of Minnesotans support requiring a photo ID to vote, *this measure has been repeatedly block [sic] by leaders in the Minnesota state legislature*).

J.A. 104-105 (emphasis added).

As Election Integrity Watch acknowledged, Minnesota law does not require voters to show photo identification at the polling place. See Minn. Stat. § 204C.10. In 2010, however, the question whether Minnesota law ought to require photo identification to vote was "the subject of public and legislative debate," Pet. App. E3-E4, as well as proposed legislation, see, *e.g.*, 2011 Minn. Laws, Ch. 69, § 24 (the 21st Century Voting Act, vetoed on May 26, 2011, requiring voters "to present a photo identification document"); see also J.A. 57-61 (explaining political nature of buttons).

D. Election Day 2010

On election day in 2010, petitioner Andy Cilek wore both a "Please I.D. Me" button and a Tea Party shirt to his polling place in Hennepin County. J.A. 78. Cilek alleges that he was deprived of his right to vote "for over five hours." J.A. 83.[10] Petitioners also allege that Dorothy Fleming and other unidentified individuals were not told to remove the "Please I.D. Me" button, J.A. 76-77, 81, and that Dan McGrath was asked by an election judge to cover or remove the button, which he refused to do. J.A. 80. No administrative complaint or prosecution was ever commenced against any person for wearing the "Please I.D. Me" button or Tea Party apparel.

II. PROCEDURAL HISTORY

A. The District Court Dismisses Petitioners' Suit against State and County Officials

Five days before the 2010 election, several individuals and organizations, including Minnesota Voters Alliance and Election Integrity Watch, sued the Minnesota Secretary of State, the Hennepin County Attorney and Elections Manager, and the Ramsey County Attorney and Elections Manager (hereinafter "Minnesota"). J.A. 8-33. The complaint alleged that Section 211B.11(1) was unconstitutional on its face and as applied to their buttons and apparel. J.A. 28-30. The district court denied a

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[10] Cilek initially alleged that "election judges refused to allow [him] to vote[.]" J.A. 78. Cilek later admitted that he was permitted to vote despite his political apparel, consistent with the Election Day Policy. Pet. App. E7 n.4.

temporary restraining order prior to the election, and after the election, plaintiffs amended their complaint to add allegations about how Section 211B.11(1) had been enforced on election day. J.A. 77-82.

The district court dismissed the amended complaint. Addressing plaintiffs' facial challenge, the district court held that, because Minnesota's polling places were nonpublic forums, Section 211B.11(1)'s restrictions on political apparel needed only to be "reasonable in light of the purpose served by the forum." Pet. App. E13 (internal citation omitted). The court held that Minnesota's restriction was "reasonably related to the legitimate state interest of 'maintain[ing] peace, order, and decorum'" at polling places. *Id.* (quoting *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966)). Having concluded that "wearing clothing or buttons expressing political ideology or beliefs" fell "within the [statute's] legitimate sweep," given the nonpublic forum, the court easily rejected plaintiffs' overbreadth challenge as well. *Id.* E29. The court also dismissed plaintiffs' as-applied claim, holding that Minnesota had "a well-established, legitimate interest in providing a safe, orderly, advocacy-free polling place," *id.* E15, that was threatened by the partisan Tea Party shirts, *id.* E17-E18, and by the "Please I.D. Me" buttons' capacity to "confuse voters" and cause them "to refrain from voting because of increased delays or the misapprehension that identification is required," *id.* E16.

B. First Appellate Proceedings and Remand

The Court of Appeals for the Eighth Circuit affirmed the dismissal of plaintiffs' facial challenge. Pet. App. D5-D10. Rejecting plaintiffs' argument that polling places

were public forums, the court held that they were nonpublic forums in which a speech restriction "is not subject to strict scrutiny and is permissible if it is viewpoint neutral and 'reasonable in light of the purpose which the forum at issue serves.'" *Id.* D8 (quoting *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46-49 (1983)). The court first held that Minnesota's restriction was viewpoint-neutral because "it applies to all political material, regardless of viewpoint," and "does not define 'political' to include or exclude any view." *Id.* Next, the court identified three purposes served by the statute—(1) "a legitimate interest in 'maintain[ing] peace, order and decorum' in the polling place'"; (2) "a compelling interest in 'protecting voters from confusion and undue influence'"; and (3) a compelling interest in "preserving the integrity of [the] election process"—and held that Section 211B.11(1) reasonably served those purposes. *Id.* D8-D10 (internal citations omitted). The court also observed that constitutionality of Section 211B.11(1)'s regulation of speech in a *nonpublic* forum followed ineluctably from *Burson* v. *Freeman*, 504 U.S. 191 (1992), because there a similar restriction on speech "'related to a political campaign' in the *public* forum *outside* the polling place" survived more stringent strict scrutiny. *Id.* D8 (emphasis in original).

The court of appeals reversed the district court's dismissal of plaintiffs' as-applied challenge. *Id.* D12. This Court denied review. See 134 S. Ct. 824 (2013). On remand, the district court rejected plaintiffs' as-applied challenge regarding both the "Please I.D. Me" buttons and Tea Party shirts. The court found that the buttons were "part of an orchestrated effort to falsely intimate to voters in line at the polls that photo identification is

required in order to vote in Minnesota" and were "connected to a campaign that aim[ed] to change state and local laws" on voter identification. Pet. App. C13-C14. The court also found that there was no genuine dispute that Tea Party-branded apparel constituted a "political badge, political button, or other political insignia." *Id.* B32. The court therefore held that prohibiting the apparel was a reasonable means of achieving Minnesota's compelling interest in ensuring the "integrity of [its] elections," *id.* C14, by "preserving the decorum of the polls," *id.*, and protecting voters from "confusion and undue influence," *id.*, and "politicking at the polls," *id.* B32.

C. Second Appellate Proceedings

Plaintiffs again appealed but abandoned their claim that Minnesota could not lawfully proscribe the "Please I.D. Me" buttons in polling places. The court of appeals affirmed, holding that Minnesota could lawfully proscribe Tea Party shirts in polling places, both because Tea Party apparel was indisputably "political" and because banning apparel with the organization's "name and logo is 'reasonable because it is wholly consistent with [Minnesota's] legitimate interest in preserving' polling place decorum and neutrality." Pet. App. A6 (quoting *Perry*, 460 U.S. at 50).

Petitioners filed a second petition for certiorari, asking this Court to decide only Section 211B.11(1)'s facial constitutionality. See Br. at I (defining question presented as whether Section 211B.11(1) is "facially overbroad under the First Amendment"). This Court granted review.

SUMMARY OF ARGUMENT

I. Minnesota's restriction on political apparel reaches only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in that polling place.

Both the reach of the statute and its limits are evident from the plain and ordinary meaning of its words. A common-sense understanding of the term "political" extends beyond messages that explicitly identify a candidate or ballot question, but is still easily understood by voters, election officials, and others in the polling place, to prohibit other messages that are related to the election at issue. That interpretation is supported by the language, context, and purpose of the surrounding statutes in Minnesota's Fair Campaign Practices Act. It has also been consistently applied by Minnesota's election officials to prohibit not only "campaign" apparel, but also "political" apparel that is viewed objectively as conveying a message about voters' electoral choices.

II. Under longstanding First Amendment jurisprudence, Minnesota's regulation of speech in government-controlled property must be analyzed under the forum doctrine.

A. This Court has previously utilized the forum doctrine to consider the constitutionality of a content-based restriction of political speech outside the polling place. See *Burson*, 504 U.S. 191. The *interior* of the polling place is similarly government-controlled property, and the forum doctrine applies equally to speech regulations in that space. Because polling places are designed for the singular purpose of voting, there is no dispute that

they are nonpublic forums. As a result, Minnesota's regulation of speech inside the polling place need be only reasonable and viewpoint-neutral.

Contrary to petitioners' suggestions, a content-based regulation of political speech is not subject to strict scrutiny if the regulation applies in a nonpublic forum. And this Court has consistently applied the forum doctrine, even when considering content-based restrictions that reach political speech. The government can act to safeguard the use of its property, and its regulatory authority is at its peak in nonpublic forums, which are not designed for or dedicated to open expression and debate. Preserving a nonpublic forum for its intended use may require the government to draw distinctions among speakers based on content, and it may do so consistent with the First Amendment, so long as it is reasonable and viewpoint-neutral.

B. Petitioners cannot avoid the application of the forum doctrine through their claims of overbreadth. The overbreadth doctrine relaxes the traditional requirements of standing, but it does not alter the substantive requirements of the First Amendment, nor does it change the applicable constitutional standard.

III. Minnesota's restriction on political apparel in the polling place is viewpoint-neutral and a constitutionally reasonable method to serve critical government interests relating to elections.

A. Minnesota's restriction maintains peace, order, and decorum in the polling place, a space dedicated to the exercise of the fundamental right to vote. Controlling the atmosphere of this space permits voters to deliberate over their solemn task and permits election of-

ficials to focus on efficient administration of the electoral process. Permitting political advocacy to invade this dignified space would carry an obvious risk of disruption or disturbance, and Minnesota can exercise its constitutional authority to regulate elections and impose a reasonable prophylactic measure that prohibits political messaging inside the polling place.

Minnesota's restriction also protects voters from the confusion, undue influence, and intimidation that could result from the display of political messaging inside the confined quarters of a polling place. This risk could come to fruition through the singular display of a confusing or hostile political message by a voter, a partisan challenger, or an election judge, or through an intimidating show of force should voters (or campaigns) orchestrate an effort to flood polling places with political messages at the final critical juncture of an election. *Burson* recognized the prevention of voter intimidation as a compelling state interest, and it acknowledged the reality that less blatant acts of intimidation, which could discourage voters from participating in an election, would not be sufficiently addressed through statutory regulations of conduct.

By preserving a calm atmosphere in the polling place, and ensuring that voters can cast their votes free from any threat of confusion or intimidation, Minnesota's restriction serves the overarching, compelling objective of election integrity. Electoral results should reflect the will of the electorate, a goal that requires assuring citizens' ability to cast secret ballots without impediments. Safeguarding the dignity of the polling place and the voters within it promotes public confidence in electoral results and such confidence is a critical component of our democracy.

B. Minnesota's restriction is viewpoint-neutral on its face, and there is no evidence that it has been applied in a discriminatory manner. Although election officials must exercise some discretion to determine which apparel is political and therefore prohibited, such discretion is constitutionally permissible in a nonpublic forum, given the government's significant latitude to control its property.

IV. Because Minnesota's statute is a reasonable restriction in a nonpublic forum, it is not facially overbroad. Beyond their generalized arguments for application of strict scrutiny or against application of the forum doctrine, petitioners offer only outlandish hypotheticals that rely on an illogical reading of the statutory text. Speculative claims that the statute would prohibit, for example, shirts of a certain color cannot support any conclusion that the statute impermissibly reaches a substantial amount of protected speech when measured against its legitimate sweep.

V. If the Court has any constitutional concern about the statute's breadth or construction, it should certify a question to the Minnesota Supreme Court for a definitive interpretation. Deference to the Minnesota Supreme Court would serve the interests of federalism and judicial restraint in this facial challenge to a state law.

ARGUMENT

I. MINNESOTA'S RESTRICTION IS LIMITED TO APPAREL AN OBJECTIVELY REASONABLE OBSERVER WOULD RECOGNIZE AS POLITICAL

The Minnesota Supreme Court has not authoritatively interpreted Section 211B.11(1)'s prohibition on wearing "political badges, political buttons, or other political insignia" in the polling place, so this Court must "extrapolate its allowable meaning" by applying the traditional tools of statutory construction. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). The Court must also consider Minnesota's "authoritative constructions of the ordinance, including its own implementation and interpretation of it." *Forsyth County, Ga.* v. *Nationalist Movement*, 505 U.S. 123, 131 (1992); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (a federal court must "consider any limiting construction that a state court or enforcement agency has proffered").

A. Section 211B.11(1)'s Meaning Is Plain

The scope of Section 211B.11(1)'s prohibition is clear from its text: because the statute refers to things "*worn* at" the polling place, it applies only to badges, buttons, and insignia printed on, affixed to, or used as apparel. Petitioners' facial challenge, then, raises only one interpretive question: what constitutes "political" apparel within the meaning of the statute?

The ordinary tools of statutory interpretation and Minnesota's longstanding practice in applying the statute supply a ready answer. Although petitioners assert

that the term "political" is "amorphous," with "no logical stopping point" (Br. 14, 25), that contention is wrong. The text, structure, and purpose of Section 211B.11(1) all point to a meaning of the term "political" that limits the scope of the statute to words or symbols conveying a message regarding the electoral choices facing Minnesota voters in the polling place, as determined by an objectively reasonable observer.

Chapter 211B does not define "political," so the term must be accorded its ordinary meaning within the context of the statute. See *Grayned*, 408 U.S. at 110. Leading dictionaries concur that "political" means "of or relating to government, a government, or the conduct of governmental affairs." Webster's Third New International Dictionary 1755 (1968); see also Merriam-Webster Collegiate Dictionary 899 (10th ed. 2001) (defining "political" as "of or relating to government, or the conduct of government" and "of, relating to, involving, or involved in politics, especially party politics"). The district court found that dictionary definitions like these "comport[ed] with the common understanding of the word political." Pet. App. E22. Hence, "political" apparel should, as a threshold matter, be understood as items that convey a message about government or the conduct of governmental affairs.

The statutory context further clarifies the meaning of "political" as Section 211B.11(1) employs the term. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Section 211B.11 is titled "Election Day Prohibitions." And the antecedent sentences in Section 211B.11(1) make clear that Minnesota's Election Day Prohibitions are concerned with ensuring that, on election day, a voter can travel to her polling place and

cast her ballot according to her own conscience, free from external coercion or suasion:

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place * * * to vote for or refrain from voting for a candidate or ballot question[, or wear a] * * * political badge, political button, or other political insignia[.]

The other regulated activities—displaying campaign materials and inducing or persuading a voter to vote for or against a candidate or ballot question—all relate specifically to voting at the polling place.[11] In context, then, the proscription on "political" apparel in Minnesota's Election Day Prohibitions applies not to *any* message regarding government or its affairs, but to messages relating to questions of governmental affairs facing voters on a given election day.

That construction is confirmed by the definition of related terms elsewhere in Minnesota's Fair Campaign Practices Act. See *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (provisions that "may seem ambiguous in isolation" should be clarified by reference to similar terms used elsewhere in the statute). The Act's definitional section does not separately define "political," but it does define the narrower phrase "political purposes": "An act is done for 'political purposes' when the act is intended or done to influence, directly or indirectly, voting at a primary or other election." Minn. Stat. § 211B.01(6). "Political" is

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[11] As petitioners point out (Br. 5), this would include areas designated for in-person absentee voting before election day. See Minn. Stat. § 211B.11(1).

used in Section 211B.01(6) as an adjective, to limit "purposes" to action undertaken to influence voting in an election. In Section 211B.11(1), then, "political" must be read to modify "badges," "buttons," and "insignia" in the same way: namely, by limiting the scope of the statute to messages related to voting, i.e., to the electoral choices at issue in the polling place. See *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

That common-sense construction of the term "political" is also consistent with this Court's treatment of that term in numerous related contexts. See, *e.g.*, *Greer* v. *Spock*, 424 U.S. 828, 831-833 (1976) (applying forum analysis to uphold a restriction on speech on a military base that included "political speeches and similar activities," which the Court applied to campaign material and a meeting to discuss election issues); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding government's ban against "political" advertising on city buses, and construing the regulation to apply to "candidacy or issue-oriented advertisements"). The Court in those cases never expressed any reservations about applying the ordinary meaning of "political."

In addition, under Minnesota law, determining whether particular conduct falls within the scope of election regulations is determined objectively, by asking how a reasonable observer would perceive the conduct. See *Minnesota Voters All.* v. *Anoka-Hennepin Sch. Dist.*, 868 N.W.2d 703, 709 (Minn. Ct. App. 2015) (whether material "promoted" passage of ballot question is examined "according to an objective reasonable-voter standard"); see also *Abrahamson* v. *St. Louis Cty. Sch. Dist.*, 819 N.W.2d 129, 136 (Minn. 2012) (applying objective reasonableness to determine whether statements "promoted" adoption of ballot question); *Schmitt* v.

McLaughlin, 275 N.W.2d 587, 591 (Minn. 1979) (looking to "average voter" in evaluating whether election publication implied endorsement). So too here: in determining whether apparel is "political," Minnesota election officials ask how a reasonable observer would perceive its message. See Pet. App. E25.

So construed, the reach of the statute is far from "limitless," as petitioners suggest. Br. 35. First, it regulates only the interior of a polling place, and only for the ten minutes or less the average voter spends there. J.A. 56, ¶11. Political apparel can be worn up to the threshold of the polling place, then simply removed or concealed during a voter's short stay inside. In that respect, Section 211B.11(1) preserves abundant opportunities to blazon political apparel—including on any day and at any place outside the polling place itself. Second, the statute does not prohibit any conceivably "political" message, but only those a typical observer would understand to convey a message about the electoral choices facing voters inside the regulated polling place.[12] In combination, those limitations minimize the burden on speech.[13]

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[12] Petitioners repeatedly argue that the district court construed the statute to apply to a virtually limitless definition of "political." See Br. 2-3, 14-15, 24-25. Petitioners cherry-pick a few phrases from the district court's order while ignoring the court's actual construction of the statute and policy. In fact, the district court construed the statute to apply to apparel that could be reasonably understood as expressing a message about voting. Pet. App. E22-E23, E29.

[13] Petitioners are wrong when they assert that individuals who violate the statute face criminal penalties. See Br. 2, 5, 9, 14, 28, 30. Violating Section 211B.11(1) is a "petty misdemeanor," see Minn. Stat. § 211B.11(4), which "does not constitute a crime" in Minnesota. See *id.* § 609.02(4a).

B. Section 211B.11(1) Has Been Applied Consistently With This Construction

Minnesota officials consistently have construed the plain meaning of the statute in the manner described above, as did the lower courts. On the eve of the 2010 election, in direct response to petitioners' motion for a temporary restraining order, respondents promulgated the Election Day Policy to provide additional guidance to election judges on the meaning of Section 211B.11(1). See Minn. Stat. § 204B.27(2) (recognizing Minnesota Secretary of State's authority to "transmit to the county auditors and municipal clerks detailed written instructions for complying with election laws relating to the conduct of elections, conduct of voter registration and voting procedures."); *Forsyth County*, 505 U.S. at 131 (the Court must consider the government's "implementation and interpretation" of a statute in resolving a facial challenge).

The Election Day Policy described several categories of apparel-borne messages that an objectively reasonable observer would recognize as conveying a message relating to electoral choices or tending to influence the election taking place, including messages: (1) containing "the name of a political party in Minnesota"; (2) including "the name of a candidate at any election"; (3) expressing "support of or opposition to a ballot question at any election"; (4) understood as "issue oriented material designed to influence or impact voting"; or (5) "promoting a group with recognizable political views" on electoral issues. See Pet. App. I2-I3; see also J.A. 58-61. The Minnesota Secretary of State also has issued an Election Judge Guide explaining that the restriction of polit-

ical material "includes displaying any political or campaign materials in the polling place, including literature or buttons." Office of the Minnesota Secretary of State, *2016 Election Judge Guide* at 31.[14]

The guidance provided in the Election Day Policy and Election Judge Guide belies petitioners' argument that the statute reaches all "political" speech, broadly construed. The first three categories set forth in the Policy describe campaign material—names of political parties and candidates, and messages about particular ballot propositions—that a reasonable observer would understand to relate directly to ballot choices. The fourth category describes apparel bearing messages that are understood as intended to influence voting directly. The "Please I.D. Me" button is paradigmatic of that class of political messages, as it was intended to discourage so-called "voter impersonation" in the polling place and, viewed objectively, expressed support for the political stance of certain candidates. J.A. 58-61, 104-105. And the fifth category is limited to "group[s] with recognizable political views" on the issues confronting voters in a given election—which, in 2010, clearly included the Tea Party, given its national prominence and connection to Minnesota electoral politics.

Respondents' litigation position has been consistent with the guidance provided by Minnesota election officials. See, *e.g.*, Hennepin County Reply Mem. (Dkt. 82, Feb. 17, 2011), at 4 (citing definition of "political pur-

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[14] See http://www.sos.state.mn.us/media/2090/election-judge-guide.pdf. The Secretary of State is required by law to distribute this guide to county auditors and election precincts. See Minn. Stat. § 204B.25; Minn. R. 8240.2000.

pose" and explaining that law is limited to political paraphernalia understood to be aimed at influencing voters); Hennepin County Appellees' Opening Br. (Sept. 21, 2011), at 34-35 (same). Respondents have never argued that the statute covers anything that conceivably could be political.[15] But neither have they accepted petitioners' paradoxical argument that "political" apparel must be limited to "campaign" apparel alone—a construction the courts below consistently rejected as untenable and contrary to the statutory text. See, *e.g.*, Pet. App. A5 (rejecting petitioners' argument that Tea Party shirts are not political); *id.* B23-B33 (same); *id.* E16 (same).

In sum, based on its plain language and context, Minnesota's consistent interpretation and application, and the lower courts' construction, Section 211B.11(1)'s restriction is limited to apparel an objectively reasonable observer would recognize as conveying a message related to the electoral choices in the polling place.

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[15] Petitioners make much of statements to the court of appeals during oral argument (Br. 8), but respondents' counsel argued only that the statute prohibits apparel from a group with recognizable views on the election, which could include AFL-CIO or Chamber of Commerce apparel *if* those groups had objectively recognizable views on an issue in the election at hand. In response to a hypothetical posed by the panel regarding Senator Ron Paul's presidential campaign, respondents' counsel further explained that the statute would not encompass a "Peace" shirt, because the word "Peace" would not be objectively understood to convey a political message about Senator Paul's campaign. See Oral Argument at 18:33 to 20:08, *Minnesota Majority* v. *Mansky*, 708 F.3d 1051 (8th Cir. 2013), available at http://media-oa.ca8.uscourts.gov/OAaudio/2012/2/112125.MP3. Respondents' counsel's analysis of those hypotheticals was consistent with the construction advanced here.

II. SECTION 211B.11(1) REGULATES SPEECH IN A NONPUBLIC FORUM, AND IT IS THEREFORE CONSTITUTIONAL IF IT IS REASONABLE AND VIEWPOINT-NEUTRAL

A. Forum Analysis Governs the Constitutionality of Section 211B.11(1)

Section 211B.11(1) regulates speech that occurs in polling places, which are property the government controls and has dedicated to enabling citizens to exercise their fundamental right to vote. Because "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property," this Court has long held that the "forum" doctrine governs the constitutionality of speech restrictions on government-controlled property. *Cornelius* v. *NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). Under that analysis, the Court determines whether "the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *United States* v. *Kokinda*, 497 U.S. 720, 726 (1990). Regulations of speech in traditional and designated public forums (sidewalks, parks, and the like) are subject to exacting scrutiny, while regulations of speech in nonpublic forums (government-controlled places not dedicated to speech-related purposes) are constitutional if reasonable and viewpoint-neutral. *Id.* at 726-727. In *Burson*, this Court applied the forum doctrine and held that a

prohibition on, among other things, displaying campaign material outside of polling places survived the exacting scrutiny applicable to public forums. 504 U.S. at 211 (plurality op.).

Burson's First Amendment analysis applies with greater force to the *interior* of the polling place—an archetypal nonpublic forum. If such speech restrictions survive strict scrutiny when applied to a public forum, they are necessarily constitutional under the more lenient standard applicable to nonpublic forums. Seeking to avoid that conclusion, petitioners contend that this Court should discard the forum doctrine and subject Section 211B.11(1) to strict scrutiny because it regulates political speech. That argument flies in the face of this Court's numerous decisions holding that the government has broad leeway to regulate political speech in nonpublic forums. Accepting petitioners' position would have sweeping consequences, as the application of strict scrutiny would severely restrict the government's ability to limit political speech in a wide range of government facilities, from courtrooms to public hospitals.

1. *Burson* establishes that speech regulations of polling places should be analyzed under forum doctrine

In *Burson*, this Court held that regulations of political speech designed to protect access to the polling place should be analyzed under the forum doctrine as regulations of government-controlled property. 504 U.S. at 196-197 (plurality op.). The Court upheld a Tennessee statute that—much like Section 211B.11(1)—prohibited certain political speech within 100 feet of the entrance to a polling place and the building in which the polling

place was located. Specifically, the statute barred "display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question[.]" Tenn. Code Ann. § 2-7-111(b); *Burson*, 504 U.S. at 193-194 (plurality op.).

A four-Justice plurality concluded that the law regulated traditional public forums (streets and sidewalks) and should therefore be subject to exacting scrutiny. See *Burson*, 504 U.S. at 196 n.2, 198. The plurality further held that the forum inquiry must take into account two critical aspects of the polling place: first, the State's compelling interest in protecting its citizens' "fundamental * * * right to cast a ballot in an election free from the taint of intimidation and fraud"; and second, the "long history" and "substantial consensus" that political-speech restrictions "around polling places [are] necessary to protect that fundamental right." *Id.* at 211. Accordingly, the plurality gave the State some deference in its choice of regulations, explaining that the historical consensus concerning the need for polling-place speech restrictions relieved the State of any burden to "demonstrat[e] empirically" that its restriction was "perfectly tailored" to its compelling interests.[16] *Id.* at 208-209.

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[16] Petitioners contend (Br. 15-16) that the principles announced in *Burson* are irrelevant because Minnesota's restriction applies to what petitioners term "passive" speech, while the statute at issue in *Burson* encompassed "active" campaigning. Petitioners' distinction is contrived. As an initial matter, the statute at issue in *Burson* prohibited passive display of campaign signs as well as active campaigning, and the Court upheld the statute in full. More broadly, this Court has never suggested that different legal standards should apply to "passive" speech. See, *e.g.*, *Lehman*, 418 U.S. at 304 (applying nonpublic forum analysis to passive

Justice Kennedy concurred that the speech restriction was constitutional because "the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right[,]" and "[t]hat principle can apply here without danger * * * for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote" and not "to suppress legitimate expression." *Id.* at 213-214 (internal citation omitted).

Recognizing the compelling interest in protecting the integrity of elections, Justice Scalia also concurred in the judgment, but would have given the State even more leeway to regulate political speech near the polling place. He agreed with the plurality that "restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot." *Id.* at 214. In view of that tradition, he concluded that the "environs of a polling place," including the sidewalks and streets outside of polling places, are a nonpublic forum, and that Tennessee's speech restriction was "at least reasonable" and therefore constitutional for the same reasons the plurality concluded the restriction survived exacting scrutiny. *Id.* at 216.

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display of advertisements); *Morse* v. *Frederick*, 551 U.S. 393, 408 (2007) (applying lower level of scrutiny applicable to student speech to display of banner).

2. Section 211B.11(1) regulates speech in a nonpublic forum and is therefore constitutional if reasonable and viewpoint-neutral

Burson and this Court's other precedents demonstrate that the constitutionality of Minnesota's restriction on political speech at the polling place must be analyzed under the forum doctrine. Section 211B.11(1), like the statute at issue in *Burson*, restricts political speech at the polling place in order to preserve the fundamental right to vote and the integrity of the voting process. Unlike *Burson*, however, the statute challenged here regulates only the *interior* of a polling place, a nonpublic forum.

This Court has defined nonpublic forums as facilities that are owned or controlled by the government and that are "not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46. Polling places are "owned or operated by the Government" on election day and on any day on which they are used for voting. *Greer*, 424 U.S. at 836; see also Minn. Stat. § 204B.16. Accordingly, the dispositive factor is the *purpose* a polling place serves either by specific "designation" or by "tradition." *Perry*, 460 U.S. at 46.

The full and effective exercise of the right to vote has long been understood to be inconsistent with electioneering within polling places themselves. Polling places are designed to enable voters to cast their ballots in secret. *Burson*, 504 U.S. at 205 (plurality op.). States, including Minnesota, have wide leeway to regulate all aspects of polling places, from how many people may enter at a time to the activities that may be conducted inside.

See *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932). Minnesota has never dedicated polling places to open expression or debate; rather, it has used them exclusively for enabling citizens to exercise "another constitutional right," *Burson*, 504 U.S. at 213-214 (Kennedy, J., concurring)—the fundamental right to vote. To protect and preserve a polling place's purpose, Minnesota not only limits political speech, see Minn. Stat. § 211B.11(1), it also prescribes who can be present, see *id.* §§ 204C.06-204C.07, and controls the physical movements of voters and others, *id.* §§ 204C.10, 204C.13. These objective characteristics provide "clear evidence" that the polling place is a nonpublic forum. *Cornelius*, 473 U.S. at 803; *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698-699 (1992) (Kennedy, J. concurring) (analyzing forum based on "objective" criteria).

Unchecked political speech would be inconsistent with the singular purpose of the polling place: conducting an election that is an accurate and trustworthy reflection of the will of the electorate, free from voter intimidation and disruption, both in perception and reality. See *Cornelius*, 473 U.S. at 803 (declining to "infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity"); *Marlin* v. *District of Columbia Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001) ("The only expressive activity involved [in a polling place] is each voter's communication of his own elective choice."). For well over a hundred years, Minnesota has limited speech in polling places to enable voters to cast ballots without disruption or intimidation. In deciding that property under the government's control is a nonpublic forum, the Court has placed great weight on the existence of historic government latitude to regulate the

property in question. See, *e.g.*, *Greer*, 424 U.S. at 837-838 (emphasizing government's broad authority to regulate military bases in concluding that the base was not a public forum); *Cornelius*, 473 U.S. at 805-806 (federal employee charitable initiative was a nonpublic forum because of the government's wide latitude to regulate its personnel). Accordingly, just as there is a "venerable tradition" of restricting political speech on streets and sidewalks adjacent to polling places, there is, if anything, an even stronger tradition of imposing similar restrictions inside polling places. *Burson*, 504 U.S. at 214 (Scalia, J., concurring in the judgment); see Appendix (identifying polling-place speech restrictions in 50 States plus the District of Columbia).

For these reasons, every court of appeals to consider the question has concluded that the interior of a polling place is a nonpublic forum.[17] Petitioners do not contend otherwise. Section 211B.11(1) is therefore constitutional if it is reasonable and viewpoint-neutral.

3. Petitioners' contention that Section 211B.11(1) should be subject to strict scrutiny is irreconcilable with this Court's precedent

Seeking to avoid the lenient standard applicable in a nonpublic forum, petitioners argue that the Court should instead apply strict scrutiny because Section 211B.11(1) is a content-based restriction on political

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[17] See *Marlin*, 236 F.3d at 719; *PG Publ'g Co.* v. *Aichele*, 705 F.3d 91, 100 n.10 (3d Cir. 2013); *United Food & Commercial Workers Local 1099* v. *City of Sidney*, 364 F.3d 738, 749-750 (6th Cir. 2004); *Mansky*, 708 F.3d at 1057.

speech. This Court, however, has repeatedly upheld such restrictions in nonpublic forums if they are reasonable and viewpoint-neutral. Petitioners offer no reason to depart from that settled precedent. Indeed, by definition, nonpublic forums are government property as to which speech on defined subjects is excluded because such speech is not compatible with the purposes to which the forum is dedicated.

a. Petitioners first observe that forum analysis is not the "*exclusive* analytical device for reviewing free speech claims." Br. 19 (emphasis in original). That is true, but only insofar as not all speech takes place on government-operated property. When the speech at issue occurs on government property dedicated to a purpose other than speech—in other words, a nonpublic forum—the Court has invariably applied a reasonableness test. See, *e.g.*, *Lee*, 505 U.S. at 679; *Kokinda*, 497 U.S. at 725; *Cornelius*, 473 U.S. at 805-806; *USPS* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 (1981); *Greer*, 424 U.S. at 838; *Adderley* v. *Florida*, 385 U.S. 39, 47-48 (1966).

Speech that occurs in a nonpublic forum is afforded less robust First Amendment protection because the government has the right, as proprietor of "property in its charge," "to preserve the property under its control for the use to which it is lawfully dedicated"—and to protect the ability of other citizens to use that property for its intended purpose. *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 679 (2010); *Cornelius*, 473 U.S. at 800; *Burson*, 504 U.S. at 213-214 (Kennedy, J., concurring). When the government restricts speech in a nonpublic forum, it acts in its managerial capacity to safeguard the purposes of the property. As a result, contrary to peti-

tioners' arguments (Br. 19), the "locus" of a speech restriction is critical in determining the degree of scrutiny that applies. "It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating" is "not the power to regulate or license, as lawmaker, * * * but, rather, as proprietor, to manage [its] internal operation[s].'"[18] *Kokinda*, 497 U.S. at 725 (internal quotation marks omitted).

b. Petitioners further contend (Br. 19-21, 30 n.9) that content-based restrictions on political speech are invariably subject to exacting scrutiny, regardless of the context. That contention is equally meritless.

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[18] The American Civil Liberties Union contends (Br. 6) that "forum analysis is not useful for this case because individuals going to vote do not seek access to government property as a platform to engage in private speech." But this Court has never suggested that the applicability of forum analysis turns on the intent of the *speaker*. Rather, forum analysis turns on the purpose for which the *government* uses the property. See *Kokinda*, 497 U.S. at 725. The sole decision on which the ACLU relies—*Cohen v. California*, 403 U.S. 15 (1971)—does not suggest that forum analysis may turn on the intent of the speaker. Cohen was convicted under a statute prohibiting "offensive conduct" in any location, for wearing a jacket displaying a vulgar expression in a courtroom. *Id.* at 16. In striking down the conviction, the Court acknowledged that the State would usually have an interest in preserving an "appropriately decorous atmosphere" in a courtroom. *Id.* at 19. But the Court declined to consider that interest because the statute did not provide notice that speech that would be permissible in a park would not be permissible in a courtroom. *Ibid.* Minnesota's statute, by contrast, is expressly limited to polling places. And in any event, petitioners here can hardly argue that they do not seek to use the polling place as a platform for private speech. The "Please I.D. Me" button has no purpose but to send a particular message in the specific context of the polling place.

The Court has applied the reasonableness analysis to numerous content-based restrictions banning political speech, but not other types of speech, in nonpublic forums. For instance, the Court has upheld as reasonable a prohibition on political speech at military installations, *Greer*, 424 U.S. at 838; a prohibition on political advertising in public transportation, *Lehman*, 418 U.S. at 304; and a prohibition on charitable solicitation of federal employees by political advocacy groups, *Cornelius*, 473 U.S. at 808-809. The Court has also applied the reasonableness analysis in evaluating the constitutionality of broader restrictions that capture political speech within their prohibitions. See *Kokinda*, 497 U.S. at 725 (upholding prohibition on solicitation outside post offices applied to political leafleting); *Adderley*, 385 U.S. at 44, 47-48 (upholding trespassing statute applied to political protesting at the entrance to a jail).[19]

Although petitioners suggest that content-based prohibitions on political speech are especially suspect, that is not so when the regulation pertains to nonpublic forums. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter"; such distinctions "are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry*, 460 U.S. at 49 (upholding rule limiting access to school mail system to bargaining union while excluding rival unions); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). As a result,

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[19] By contrast, petitioners rely on cases that did not involve nonpublic forums for their contention that strict scrutiny applies to content-based restrictions on political speech. See, *e.g.*, *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2224-2226 (2015); *Citizens United* v. *FEC*, 558 U.S. 310, 329 (2010).

content-based, viewpoint-neutral distinctions in the context of a nonpublic forum do not ordinarily raise any inference that the government is attempting to suppress disfavored speech. See *Burson*, 504 U.S. at 213-214 (Kennedy, J., concurring). The government therefore may permissibly prohibit political speech in a nonpublic forum, if it has reasonably determined that such speech is incompatible with the purpose of the nonpublic forum. *Greer*, 424 U.S. at 838; accord *Cornelius*, 473 U.S. at 809; *Lehman*, 418 U.S. at 304.

Indeed, the government often has sound reasons to conclude that political speech is particularly threatening to the relevant government functions, and that a content-based limitation on political speech (but not other speech) is a reasonable means of accomplishing the government's objectives. Political speech may threaten the cohesion of public workplaces, *Cornelius*, 473 U.S at 807-811, or create security risks that other speech would not, *Lehman*, 418 U.S. at 304; *Greer*, 424 U.S. at 839-840. Even "passive" political speech, in petitioners' phrasing, may threaten important government interests. For instance, permitting the display of political slogans in courtrooms could undermine public confidence in the courts' political neutrality. See *United States* v. *Grace*, 461 U.S. 171, 183 (1983); *Hodge* v. *Talkin*, 799 F.3d 1145, 1165 (D.C. Cir. 2015) (upholding prohibition on protesting on the Supreme Court's plaza); *Berner* v. *Delahanty*, 129 F.3d 20, 27 (1st Cir. 1997) (upholding prohibition on attorneys' political buttons in courtroom which "can reasonably be thought to compromise the environment of impartiality and fairness").

Subjecting these sorts of restrictions to strict scrutiny, as petitioners urge, would hamstring the government's ability to use a wide range of public facilities for

their designated purposes. Numerous political-speech restrictions—from the Hatch Act's regulation of political displays in government buildings, to this Court's restrictions on protesting within its courtroom—would be subject to strict scrutiny. That "would, in practical effect, invalidate," or at least severely curtail, legitimate and important restrictions imposed to protect government functions rather than to suppress disfavored speech. *Christian Legal Soc'y*, 561 U.S. at 681 (citing *Cornelius*, 473 U.S. at 806). "[P]ublic hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician." *Kokinda*, 497 U.S. at 726 (quoting *Lehman*, 418 U.S. at 304). "This the Constitution does not require." *Id.*

B. Petitioners' Overbreadth Argument Provides No Independent Basis For Relief

In their attempt to bypass the forum doctrine, petitioners also argue that Section 211B.11(1) is "unconstitutionally overbroad whether or not polling places are a non-public forum." Br. 16. Overbreadth doctrine, however, does not furnish any additional, independent basis for invalidating the statute.

1. The overbreadth doctrine "alter[s the] traditional rules of standing" to permit a litigant to challenge a statute "not because their own rights of free expression are violated, but because * * * the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). The doctrine permits invalidation of a statute as void on its face—despite its constitutional application to the plaintiff—if its

unconstitutional applications are "substantial" in relation to its legitimate sweep. *Id.* at 615. Here, the court of appeals held that petitioners' own speech constitutionally could be prohibited, and petitioners did not seek review of that judgment.[20] Since their own conduct is not protected, petitioners invoke overbreadth doctrine to invalidate the statute on its face.

Petitioners also appear, however, to invoke overbreadth as an independent justification for invalidating the statute. Br. 30, 38-42. But while overbreadth doctrine addresses the situations in which the extreme remedy of facial invalidation is appropriate, it does not alter the substantive First Amendment standards that would otherwise apply in determining the scope of the statute's legitimate sweep in the first instance. See *Greer*, 424 U.S. at 838 (rejecting facial challenge by applying lenient nonpublic forum speech test); *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564, 580 (1973) (evaluating overbreadth challenge to certain Hatch Act revisions under the lower scrutiny applicable to restrictions on public employee speech); *Talkin*, 799 F.3d at 1171 (rejecting overbreadth argument because it is "analytically identical" to the claim that the statute was an unreasonable

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[20] Petitioners nonetheless attempt to revive their as-applied challenge, as they now contend that Minnesota's restriction cannot be constitutionally applied to their own apparel. Br. 39. Because petitioners could have, but did not, seek certiorari on that question, this Court should not consider it. *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 938 n.2 (2017). Petitioners' as-applied challenge also is not fairly included within the question presented, which asks only whether the statute is "facially overbroad." Sup. Ct. R. 14.1(a); *Loughrin* v. *United States*, 134 S. Ct. 2384, 2389 n.3 (2014).

and "invalid restriction of speech in a government forum") (internal citation omitted). Petitioners' overbreadth argument therefore does not provide any basis for bypassing the forum analysis, or any independent substantive ground on which to invalidate the statute. The constitutionality of Section 211B.11(1) turns on whether the statute is a reasonable, viewpoint-neutral restriction of speech in a nonpublic forum. A conclusion that the statute, considering all its applications, is reasonably tailored to further the State's interests necessarily means that the regulation is not substantially overbroad. See *Talkin*, 799 F.3d at 1171 ("Having concluded that the government's means-ends fit is reasonable, we see no viable avenue for concluding nonetheless that § 6135 has too many unconstitutional applications to survive."); *Bryant* v. *Gates*, 532 F.3d 888, 894 n.** (D.C. Cir. 2008) (same).[21]

2. Petitioners also suggest, citing *Board of Airport Comm'rs of City of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), that the Court "need not decide whether polling places are a public or non-public forum,

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[21] Petitioners (Br. 32) and several amici also argue that Minnesota's restriction is unconstitutionally overbroad if it reaches any political speech beyond "express words of advocacy," *Buckley* v. *Valeo*, 424 U.S. 1, 44 n.52 (1976), and its functional equivalent, *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007). However, this Court has explicitly "rejected the notion that the First Amendment requires [government] to treat so-called issue advocacy differently from express advocacy," and repudiated the line between them as "functionally meaningless." *McConnell* v. *FEC*, 540 U.S. 93, 193-194 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. at 365. Hence, Minnesota's political apparel restriction is constitutional if it is reasonable and viewpoint-neutral.

or whether the public forum doctrine is irrelevant" because "no conceivable governmental interest" could support a ban on "the entire class of political messages that can be conveyed through clothing[.]" Br. 30. This argument is deeply flawed. As the longstanding precedents discussed above show, the Court must first decide what level of scrutiny applies, and then determine whether the statute sweeps too widely to be adequately tailored under that standard.

Jews for Jesus does not suggest otherwise. There, the Court invalidated a Los Angeles International Airport rule that banned all "First Amendment activities by any individual and/or entity." 482 U.S. at 570-571. The ordinance thus prohibited "*all* protected expression," including "even talking and reading." *Id.* at 574-575. Contrary to petitioners' suggestions about the relevance of the forum doctrine, the *Jews for Jesus* Court acknowledged that forum analysis applied because the airport was government property, but the Court concluded that it need not determine whether the airport was a nonpublic forum, because the sweeping prohibition would be invalid as overbroad "regardless of the proper standard." *Id.* at 573-574. Thus, to the extent that petitioners contend *Jews for Jesus* created any separate test for overbreadth claims, they are mistaken. The Court utilized the forum doctrine, but simply concluded that the airport ordinance was unconstitutional even under the reasonableness test applicable to nonpublic forums.

III. MINNESOTA'S POLITICAL APPAREL RESTRICTION IS REASONABLE AND VIEWPOINT-NEUTRAL

A restriction on speech in a nonpublic forum is constitutionally valid if it is "reasonable in light of the purpose which the forum at issue serves" and viewpoint-neutral. *Perry*, 460 U.S. at 49; *Cornelius*, 473 U.S. at 800. That is not a demanding standard. See *Lee*, 505 U.S. at 679 (describing "limited review"). The government's "decision to restrict" speech "need not be the most reasonable or the only reasonable limitation" that would advance the forum's purpose. *Cornelius*, 473 U.S. at 808. Thus, there is no requirement "that the restriction be narrowly tailored" to the advancement of the government's interests. *Id.* at 809; see *ibid.* ("In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated."). Instead, the restriction need only be "consistent" with the government's "legitimate interest in preserv[ing] the property * * * for the use to which it is lawfully dedicated." *Perry*, 460 U.S. at 50-51 (internal quotation marks omitted).

Minnesota's restriction, which applies only in a limited place and at limited times, readily satisfies that test. A polling place has a singular function: it is open to the public only for the purpose of permitting citizens to vote in a fair and secure manner. By design and necessity, it is a restricted location in which limits are placed on who can be present and on what they can do. See p. 30, *supra*; see generally *Kokinda*, 497 U.S. at 732 ("Consideration of a forum's special attributes is rele-

vant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.") (internal quotation marks and alteration omitted). Minnesota's restriction is reasonable in light of its purpose because it advances three critical government interests: "maintain[ing] peace, order and decorum" in the polling place, "protecting voters from confusion and undue influence" such as intimidation, and "preserving the integrity of its election process." Pet. App. D8 (quoting *Burson*, 504 U.S. at 199); see, *e.g.*, *Marlin*, 236 F.3d at 720. Moreover, Minnesota's restriction applies neutrally to political content regardless of the viewpoint being expressed.

A. Section 211B.11(1) Reasonably Advances the State's Interests in Safeguarding the Polling Place

1.a. Minnesota's restriction of political apparel in the polling place reasonably advances Minnesota's powerful interest in maintaining an orderly and peaceful place where election activity can be conducted with decorum.

As this Court has frequently explained, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17; see, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society[.]"); *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our consti-

tutional structure."); *Burson*, 504 U.S. at 198-199 (plurality op.). The Constitution grants States authority to regulate elections so they can protect that fundamental right. See U.S. Const. Art. I, § 4, cl. 1.

Because voting rights are of such bedrock importance, a polling place—like a courtroom—can reasonably be restricted to reflect the solemn and weighty nature of the function that occurs there. See generally *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) (explaining that it is important that "order, rather than chaos, is to accompany the democratic processes") (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)); cf. *Grace*, 461 U.S. at 182 (acknowledging the government's interest in "proper order and decorum within the Supreme Court grounds"). This Court therefore has expressly recognized the "State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum" and its strong interest in enacting such regulation. *Mills*, 384 U.S. at 218; see *Smiley*, 285 U.S. at 366.

Minnesota's restriction reasonably serves that interest, and thereby protects and dignifies voters' fundamental right to make electoral choices. The prohibition on political apparel in the polling place ensures that voters are focused on the voting activity; that election judges can focus on their tasks, rather than policing altercations and disturbances; and that the voting process inside the polling place runs smoothly. Cf. *Kokinda*, 497 U.S. at 735. Absent Minnesota's restriction, the polling place would become another place (perhaps a primary place) where individuals could promote their views by inundating voters with political messages. Campaigns and other groups could even organize to have specially designed campaign or political apparel handed out at

the polling place. In fact, history shows that is exactly what they once did. See p. 5, *supra*; *Burson*, 504 U.S. at 203-205 (plurality op.).

By barring such advocacy from inside the polling place, the law carves out an island of calm in which voters can peacefully contemplate their choices, engage in sound deliberation, and carry out their civic responsibility. Whatever divisions separate the State's citizens, in a space free of political messages voters can be united in their participation in the democratic process—even when they are deciding on issues that may be controversial and evoke passionate feelings—rather than riven by dispute and debate up to the very moment they cast their votes. If, in contrast, voters must navigate a polling place environment in which they are bombarded with political messages, those advantages are lost, divisions among citizens are brought to the fore, and the ability to vote is needlessly impeded.

Moreover, although the law promotes Minnesota's interests in peace and decorum even absent the possibility of any fighting in the polling place, political messages on apparel could give rise to verbal disputes or even physical altercations. See, *e.g.*, *Marlin*, 236 F.3d at 720 (recognizing the District of Columbia's interest in "protecting the orderly conduct of elections by creating a neutral zone within the polling place" and "preventing altercations over hot-button issues") (internal quotation marks omitted). In order to vote, people of differing views—and, in some places, large numbers of such people—must necessarily come together and be processed through one physical location. Tensions may well be running high, particularly when the election has been a contentious one, or the issues at stake are particularly momentous.

Minnesota need not prove that it has experienced such problems in order to establish that its restriction reasonably advances the purpose of the polling place. See *Perry*, 460 U.S. at 52 n.12; cf. *Burson*, 504 U.S. at 209 (plurality op.) (stating that a legislature "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively"). Based on experiences in other States, however, the potential for political messages in the polling place to give rise to verbal and physical conflict is indisputable.[22] Minnesota's law thus helps ensure that polling places remain calm and dignified, so that voting can be carried out peacefully and efficiently, rather than becoming forums where the political tensions in our society boil over and the right to vote is degraded.

b. Minnesota's restriction also reasonably serves the State's compelling interest in "protecting voters from confusion and undue influence" such as intimidation. *Burson*, 504 U.S. at 199 (plurality op.).

This Court recognized in *Burson* that a state statute prohibiting display of campaign materials in the public forum outside the polling place is justified by the interest in avoiding voter intimidation and confusion. See *id.* at 197, 210 (plurality op.). The same concerns exist to an even greater extent inside the polling place, where voters congregate in a limited space that they must enter

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[22] See, *e.g.*, https://www.nbcmiami.com/news/local/Woman-Pepper-Sprays-Man-at-Jupiter-Polling-Place--400433541.html (recounting fights at two polling places, one involving pepper spray and one involving a gun) (last visited Feb. 1, 2018); http://www.mlive.com/news/ann-arbor/index.ssf/2016/11/man_shoves_woman_after_argumen.html (recounting physical fight at polling place over presidential election) (last visited Feb. 1, 2018).

and stay in for a period of time in order to vote, see *ibid.*; see also *id.* at 220 n.4 (Stevens, J., dissenting)—and it is therefore reasonable in that setting to extend the prohibition beyond campaign materials to encompass political apparel. Cf., *e.g.*, *Citizens for Police Accountability Political Comm.* v. *Browning*, 572 F.3d 1213, 1218-1219 (11th Cir. 2009) (applying strict scrutiny and recognizing that a viewpoint-neutral prohibition on political speech, and not just campaign speech, in buffer zone around a polling place advances government's goal of preventing intimidation and confusion); *Schirmer* v. *Edwards*, 2 F.3d 117, 122-123 (5th Cir. 1993) (relying on *Burson* and ruling that total ban on "politicking," including wearing political buttons and t-shirts within a 600-foot radius of polling place, was constitutional under strict scrutiny).

Assessment of the reasonableness of Minnesota's regulation in preventing voter confusion and intimidation is not limited to consideration of the effect that would result from only one or two voters wearing political apparel in a polling place, "[f]or if [petitioners are] given access, so too must other[s]." *Lee*, 505 U.S. at 685. Rather, the Court must consider the potential impact on voters if polling places become a location in which citizens are subject to a barrage of political and campaign messages.[23] Without this law, campaigns and advocacy

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[23] By the same token, the abundant other avenues for expression of speech outside of the polling place weigh in favor of Section 211B.11(1)'s reasonableness. See *Christian Legal Soc'y*, 561 U.S. at 690. Minnesota's restriction applies only within the confines of the polling place and is not onerous: individuals are informed by an election judge if their apparel violates the law and asked only to cover that political apparel while inside the polling place.

groups will be able to organize supporters to wear political apparel to the polling place in an effort to win elections, perhaps focusing on peak voting times.

A voter could well feel confused or intimidated if (for example) she walked into a polling place and discovered that every other voter held the opposite point of view on any number of controversial political issues related to electoral choices, as evidenced by the political messages displayed on other voters' apparel. That feeling would be amplified if the voter were forced to consult with an election judge, and that judge were displaying a partisan message with which the voter disagreed. The feeling also would be amplified by the presence of a partisan challenger, standing behind the election judge and prepared to question the voter's eligibility to vote, while wearing a t-shirt that brazenly announces a political position or affiliation. See *Burson*, 504 U.S. at 207 (plurality op.) (recognizing concern that "undetected or less than blatant acts" of intimidation or interference may "drive the voter away"). The voter could not escape or avoid those political messages or the accompanying feeling of confusion or intimidation without leaving the polling place where she must come to vote. *Lehman*, 418 U.S. at 302-304 (discussing First Amendment problems associated with subjecting a "captive audience" to "the blare of political propaganda").

Those are not imaginary risks (although proof that the State already has faced them is not necessary, see p. 44, *supra*). Particularly in an era of intense polarization, many aggressive, vulgar, or racially targeted campaign and political messages could seriously affect voters if displayed in a polling place. And the record in this very case demonstrates that petitioners' "Please I.D. Me" buttons were designed to be worn at the polling

place in part to confuse voters into thinking that voter identification was a requirement in Minnesota and that they had to either show photographic identification or leave without voting. J.A. 104-105; Pet. App. D12 (district court recognizing that "[t]his intimation could confuse voters and election officials and cause voters to refrain from voting because of increased delays or the misapprehension that identification is required"); cf. *Lee*, 505 U.S. at 684 (recognizing that the interference caused by solicitation is compounded by "the fact that, in an airport, the targets of such activity frequently are on tight schedules").[24] That is speech that "interfere[s] with the act of voting itself," *Burson*, 504 U.S. at 209 n.11 (plurality op.), and the State may reasonably restrict it.

c. Ensuring an atmosphere of peace, order, and decorum and protecting voters from confusion and intimidation are worthy goals in their own right. But in reasonably advancing those goals, thereby protecting the right of citizens to vote freely for the candidates of their choice, Minnesota's law also furthers the State's compelling interest in the integrity and reliability of its electoral process. See *Burson*, 504 U.S. at 198-199 (plurality

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[24] There is no doubt that an objectively reasonable observer at the 2010 election also would perceive the buttons as a political message, given that voter identification was a much-debated political issue nationally and an important campaign issue for statewide candidates in Minnesota at that time, J.A. 57-61 ¶¶18-26—but the buttons would not meet the definition of "campaign" apparel because voter identification was not (yet) a ballot question in Minnesota in 2010. The campaign to wear "Please I.D. Me" buttons in the polling place thus was prevented only by the fact that Minnesota's restriction extends beyond campaign apparel.

op.); see also *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1671 (2015) (recognizing that "when the State's compelling interest is as intangible as public confidence in the integrity" of an important function of government, the government must be provided greater flexibility in drafting regulations to protect that interest).

A core state function is establishing a participatory process that ensures electoral results are an accurate reflection of the will of the electorate.[25] More than 100 years ago, at a time when the State's elections were chaotic, see, *e.g.*, *Burson*, 504 U.S. at 203-205 (plurality op.) (recounting free-for-all of American electoral scene leading up to reforms of the late 1800s), Minnesota concluded that a buffer zone outside the polling place was insufficient to protect the integrity of its electoral process and determined that a polling place free from political badges, buttons, and insignia was needed to free voters from disruptions and help ensure that the election process was fair and unbiased. As a result of the provision at issue in this case, Minnesota polling places have provided voters a protected space to participate in the election of their leaders. Those polling places also protect the secrecy of the ballot, see *ibid.* (discussing centrality of secret ballot to American electoral practice), by ensuring that voters are not treated disparately by election authorities based on the political preferences

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[25] That is, at least in part, why States possess such broad constitutional powers to control the conduct of elections, including "supervision of voting, protection of voters, prevention of fraud and corrupt practices," and authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366; see *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986).

displayed on the voters' apparel. Minnesota's restriction is an integral part of an electoral structure designed to guarantee that elections are conducted reliably and fairly with maximal citizen participation.[26] Cf. *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965) (recognizing State's prerogative to "adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence").

Minnesota's restriction also serves the State's compelling interest in election integrity because the law ensures that the public has confidence in the electoral process. A regime allowing election judges, election observers, and the majority of voters and others present at a polling place to all wear apparel strongly signaling support for one side of the conservative/liberal divide could well be viewed with suspicion by the public, who would wonder if the workings of the polling place (and the electoral results) have been unduly influenced by a particular political viewpoint. Minnesota's law assists in preventing this risk to the legitimacy of the elected branches of government from becoming a reality. This Court has accepted in several decisions the importance of protecting the judicial process from "the possibility of a conclusion by the public * * * that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *Cox*, 379 U.S. at 565 (upholding ban on courthouse-area demonstrations); see, *e.g.*, *Williams-Yulee*,

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[26] Minnesota often leads the country in voter turnout. See, *e.g.*, http://www.sos.state.mn.us/election-administration-campaigns/data-maps/historical-voter-turnout-statistics/ (last visited Feb. 2, 2018) (nearly 75 percent of eligible Minnesotans voted in the 2016 election).

135 S. Ct. at 1666 ("public perception of judicial integrity" is a governmental interest of "the highest order"); *Talkin*, 799 F.3d at 1164. Protection of the legitimacy of the electoral process from that kind of public judgment is of equal importance.

2. Although petitioners address the constitutionality of Minnesota's law under the test applicable to a nonpublic forum only in a perfunctory footnote (Br. 42 n.14), they do argue generally that the interests of the State are insufficient to justify restrictions on speech within a polling place. See *id.* at 30-35. Those arguments are inapposite, both because they incorrectly assume that strict scrutiny is the applicable standard and because they mistakenly attribute an extraordinarily broad scope to Minnesota's restriction. They are also wrong on their own terms.

First, petitioners insist that wearing political apparel is always a wholly passive act that cannot possibly interfere with the peacefulness of the polling place or cause a voter to feel pressured or intimidated. But that is demonstrably untrue—and, in any event, Minnesota could reasonably conclude otherwise. As petitioners themselves acknowledge, "powerful messages can sometimes be conveyed in just a few words," Br. 26 (quoting *Matal* v. *Tam*, 137 S. Ct. 1744, 1760 (2017)), and *Burson* recognized that passive displays of campaign messages can have harmful effects. See *Burson*, 504 U.S. at 210 n.13 (plurality op.) (rejecting argument that statute was overbroad because it reached "display" of a bumper sticker or similar displays); *id.* at 223-224 (Stevens, J. dissenting) (recognizing that the speech restriction applied to "wearing of campaign buttons," among other displays); see also *Morse*, 551 U.S. at 408 (public school

may prohibit speech advocating illegal drug use); Supreme Court of the United States, *Visitor's Guide to Oral Argument* (prohibiting individuals from wearing "display buttons and inappropriate clothing").[27]

There is no question that political apparel in polling places could lead to verbal or physical altercations, convey to particular voters the idea that they are unwelcome and that their vote does not matter, confuse voters about whether they can vote, or give rise to a public perception that an election is being conducted in an unfairly partisan way. And when people come together to make choices about the future of their government, thereby often confronting questions on which there is passionate disagreement, it is beneficial to carve out a narrow space for voting that is calm, dignified, and devoid of advocacy relating to electoral choices. Any other approach would permit political apparel such as petitioners' "Please I.D. Me" buttons, which were specifically intended to have *physical* effects in the polling place by disrupting the voting process.

The authorities cited by petitioners for the proposition that the wearing of apparel is always a passive act (*e.g.*, Br. 15) are readily distinguishable. None of those authorities involves the particular set of concerns, and the especially strong government interests, that are applicable to polling places, where an expressive act takes place that is the fount of all other democratic rights. And all of the authorities turn on particular facts that are not relevant to petitioners' facial challenge. In *Tinker* v. *Des Moines Independent Community School District*, for example, the Court—in the course of finding viewpoint

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[27] See https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx (last visited Feb.2, 2018).

discrimination because the school did not bar "wearing of all symbols of political * * * significance"—said only that "the wearing of armbands *in the circumstances of this case* was * * * divorced from actually or potentially disruptive conduct." 393 U.S. 503, 505-506, 510 (1969) (emphasis added); compare *Morse*, 551 U.S. at 408. And in *Jews for Jesus*, the Court characterized, in passing, the "wearing of a T-shirt or button that contains a political message" as "non-disruptive" to other passengers at an airport who were not themselves engaged in any political endeavor. 482 U.S. at 576.

Second, petitioners contend (*e.g.*, Br. 5-6) that the restriction on political apparel is not necessary to preserve the peace or to prevent confusion or intimidation because other state laws already forbid disorderly conduct, force, fraud, and deception in connection with voting. That argument—which was soundly rejected in *Burson* despite the exacting scrutiny applied in that case, see 504 U.S. at 206-207 (plurality op.)—lacks merit. Under the reasonableness test applicable in a nonpublic forum, the speech restriction "need not be the most reasonable or the only reasonable limitation" imposed in the forum, *Cornelius*, 473 U.S. at 808, and there is nothing "improper in [a legislature] providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest," *United States* v. *O'Brien*, 391 U.S. 367, 380 (1968); see, *e.g.*, *Talkin*, 799 F.3d at 1165-1166. In addition, with respect to protection of voting—the most central and sacred act in our democracy—the State need not restrict itself to addressing only actual physical disruption of the polling place, or actual intimidation of voters, that is witnessed by the authorities. As the *Burson* plurality explained, "[i]ntimidation and interference laws fall short of serving a

State's compelling interests because they deal with only the most blatant and specific attempts to impede elections" and do not adequately address attempts that go "undetected." 504 U.S. at 206-207 (plurality op.) (internal quotation marks omitted). Minnesota's restriction on political apparel is a reasonable effort to prevent acts that undermine citizens' ability to vote from ever taking place. See *ibid.*

B. Section 211B.11(1) Does Not Discriminate On The Basis Of Viewpoint

As the court of appeals correctly recognized, Minnesota's restriction is viewpoint-neutral on its face: it bars political apparel from the polling place regardless of the *viewpoint* being expressed. See Pet. App. D8. Because petitioners' challenge is only a facial one, see Pet. i, the viewpoint-neutrality prong of the applicable test for a nonpublic forum is satisfied. See, *e.g.*, *Kokinda*, 497 U.S. at 736 (upholding prohibition on solicitation on postal office premises, in part because "nothing suggests the Postal Service intended to discourage one viewpoint and advance another") (citation and internal quotation marks omitted); see also *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 583 (1998) (upholding restriction that "do[es] not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face").

Petitioners nevertheless contend (*e.g.*, Br. 22, 35) that Minnesota's restriction leaves too much room for discretion in its enforcement. That contention is misplaced. In a nonpublic forum, the government's broad leeway to restrict particular categories of speech that threaten the forum's function and purpose necessarily

entails discretion to apply those restrictions to individual cases to determine whether or not speech falls within the scope of a content-based restriction. See, *e.g.*, *USPS*, 453 U.S. at 130-31 (explaining that a high degree of official discretion is tolerable in nonpublic forums); *Perry*, 460 U.S. at 47 (discretion over use of an interschool mail system); *Greer*, 424 U.S. at 838 n.10 (discretion to prohibit "political" speeches while allowing others); see also *Finley*, 524 U.S. at 576, 589-590 (approving broad discretion to take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" in NEA grant process); *Griffin* v. *Secretary of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002) ("Selectivity and discretion are some of the defining characteristics of the nonpublic forum.").

In some circumstances, a law may be vague enough that it gives officials too unfettered an opportunity to enforce their own viewpoint preferences. See *United States* v. *Williams*, 553 U.S. 285, 304 (2008) (claim that statute was so "standardless that it authorizes or encourages seriously discriminatory enforcement" was a vagueness claim analyzed under due process standards). But petitioners have not made a vagueness argument in this Court, or preserved such an argument in the lower courts. See Pet. App. B29-B30 n.7, D8 n.2 (holding that petitioners waived their vagueness challenge by failing to brief it on appeal).[28] Nor would such

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[28] Moreover, because Minnesota's restriction proscribed petitioners' own conduct, as the lower courts definitively ruled, Pet. App. A7, B29-B30, C19, they "cannot complain of the vagueness of the law as applied to the conduct of others." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (internal quotation omitted).

an argument have merit. Minnesota's restriction—which is not a criminal one—has a definite, ascertainable meaning. See Part I, *supra*; see also generally *Broadrick*, 413 U.S. at 608 (finding that statute was not unconstitutionally vague as to restrictions on partisan political conduct by state employees and stating that "the prohibitions * * * are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest") (quoting *Letter Carriers*, 413 U.S. at 578-579); see also *Ward*, 491 U.S. at 794 ("[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."). And this Court has previously upheld restrictions on "political" speech in nonpublic forums without suggesting that the term was incapable of a firm interpretation. See, *e.g.*, *Lehman*, 418 U.S. at 302-304; *Greer*, 424 U.S. at 838.

Petitioners have no evidence of any discriminatory enforcement of Minnesota's restriction, because none exists. Moreover, because Minnesota law requires each polling place to have election judges from different political parties, any risk of viewpoint discrimination is dramatically lessened. See Minn. Stat. § 204B.19(5). If the restriction were in fact enforced in a discriminatory manner in the future, then that problem could be dealt with through an as-applied challenge at that time.

IV. MINNESOTA'S POLITICAL APPAREL RESTRICTION IS NOT FACIALLY OVERBROAD

Because Minnesota's political apparel restriction is a reasonable restriction on speech within a nonpublic forum, it is also not facially overbroad. As discussed in

Part II.B, *supra*, if the Court concludes that the provision's breadth is reasonable in light of the State's compelling interests, there is no "viable avenue for concluding nonetheless that [it] has too many unconstitutional applications to survive." *Talkin*, 799 F.3d at 1171. Petitioners' overbreadth argument therefore provides no separate basis for invalidating Section 211B.11(1).

Moreover, petitioners' overbreadth argument is premised on their assumption that Minnesota's restriction would reach "even the most general references to political issues, beliefs, and associations" (Br. 24)—including red and blue shirts. This absurd construction has never been applied by election officials, urged by the State, or adopted by any court—and it is wrong for the reasons discussed in Part I. Because the heartland of Section 211B.11(1)'s applications furthers Minnesota's interests, the "mere fact" that petitioners "can conceive of some impermissible applications of [the] statute is not sufficient to render it" unconstitutionally overbroad. *Williams*, 553 U.S. at 303; *Members of the City Council* v. *Taxpayer for Vincent*, 466 U.S. 789, 800 (1984). Petitioners have not shown "from the text of [the statute] and from actual fact that a substantial number of instances exist in which [the statute] cannot be applied constitutionally." *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 14 (1988).

V. IN THE ALTERNATIVE, THIS COURT SHOULD CERTIFY A QUESTION TO THE MINNESOTA SUPREME COURT

Petitioners' constitutional arguments are premised on their assertion that the reach of Minnesota's restriction is virtually unlimited. Their construction of the

statute is farfetched and divorced from any actual application of the law. See Part I, *supra*. But if this Court concludes that petitioners have raised a substantial question about the proper interpretation of Section 211B.11(1), it should certify the statutory-construction question to the Minnesota Supreme Court.[29] See, *e.g.*, *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *Bellotti* v. *Baird*, 428 U.S. 132, 151-152 (1976) (collecting cases). Affording that court the opportunity to issue a definitive interpretation would be most consistent with considerations of federalism and judicial restraint.

Because the statutory interpretation question is antecedent to the question whether the provision complies with the First Amendment, certification could obviate the need for this Court to pass judgment on the statute's constitutionality. The Minnesota Supreme Court could adopt a narrowing construction.[30] Certification would enable this Court to honor the "cardinal principle" that courts must "first ascertain whether a construction *** is fairly possible that will contain the statute within constitutional bounds" before striking it down. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 78 (1997);

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[29] Minnesota has authorized its supreme court to answer certified questions. See Minn. Stat. § 480.065(3).

[30] For example, in 1993, the prohibition on political apparel was extended to areas designated prior to election day for in-person absentee voting. See 1993 Minn. Laws ch. 223, § 25. If that application raises any concern of overbreadth, then the Minnesota Supreme Court could answer definitively whether that provision is severable. See Minn. Stat. § 645.20; *Leavitt* v. *Jane L.*, 518 U.S. 137, 139 (1996) (per curiam) ("Severability is of course a matter of state law.").

see also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 509 (1985) (O'Connor, J., concurring).

Certification would also respect weighty state interests. *Id.* at 77. There can be no serious dispute that Minnesota's restriction serves compelling state interests in ensuring that citizens can exercise their fundamental right to vote without intimidation or interference. *Burson*, 504 U.S. at 198-199 (plurality op.). There is also no doubt that the statute has a wide range of constitutional applications. Indeed, as the court of appeals held, the statute was validly applied to petitioners' own expression. The State therefore has an overriding interest in applying the statute to that speech to which it can constitutionally be applied. Before invoking the "strong medicine" of facially invalidating the statute, the Court should permit the Minnesota Supreme Court to decide whether the statute is susceptible to a limiting instruction. *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). In other First Amendment cases, similarly substantial state interests have led this Court to conclude that the courts "should not attempt to decide the constitutional issues presented without first having the [State] Supreme Court's interpretation of key provisions of the statute." *American Booksellers*, 484 U.S. at 393; *Arizonans*, 520 U.S. at 77-79. This Court should not strike down Section 211B.11(1) as unconstitutional before deferring to the Minnesota Supreme Court for a definitive interpretation.

CONCLUSION

The judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

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APPENDIX

State Polling Place Restrictions

Alabama

Any person at a primary election who shall * * * electioneer or attempt to electioneer with a voter or attempt to influence his or her vote by suggestion or otherwise, * * * shall be guilty, upon conviction, of a Class A misdemeanor.

Ala. Code § 17-17-55; see also Ala. Sec'y of State, *Frequently Asked Questions* (permitting campaign buttons or shirts), http://sos.alabama.gov/alabama-votes/faqs (last visited Jan. 31, 2018).

Alaska

During the hours the polls are open, a person who is in the polling place or within 200 feet of any entrance to the polling place may not attempt to persuade a person to vote for or against a candidate, proposition, or question. * * *

Alaska Stat. Ann. § 15.15.170.

A person commits the offense of campaign misconduct in the third degree if ... during the hours the polls are open ... the person is within 200 feet of an entrance to a polling place, and (A) violates AS 15.15.170; or (B) circulates cards, handbills, or marked ballots, or posts political signs or posters relating to a candidate at an election or election proposition or question.

Alaska Stat. Ann. § 15.56.016(a)(2); see also State of Alaska, *Official Election Pamphlet* at 4 (Nov. 8, 2016) (prohibiting signs or buttons), http://elections.alaska.gov/election/2016/General/OEP-Books/20194%20AK%20Region%20II%20book.pdf.

Arizona

A. Except as prescribed in this section and § 16-580, a person shall not be allowed to remain inside the seventy-five foot limit while the polls are open, except for the purpose of voting, and * * * no electioneering may occur within the seventy-five foot limit. * * *

I. For the purposes of this section, electioneering occurs when an individual knowingly, intentionally, by verbal expression and in order to induce or compel another person to vote in a particular manner or to refrain from voting expresses support for or opposition to a candidate who appears on the ballot in that election, a ballot question that appears on the ballot in that election or a political party with one or more candidates who appear on the ballot in that election

Ariz. Rev. Stat. Ann. § 16-515.

Arkansas

(A) * * * Except as provided in subdivisions (a)(9)(B) and (C) of this section, no person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever in the building or within one hundred feet (100') of the primary exterior entrance used by voters to the building containing the polling place on election day.

(B) During early voting days, no person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any

candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever during early voting hours in the building or within one hundred feet (100') of the primary exterior entrance used by voters to the building containing the early voting site nor engage in those activities with persons standing in line to vote whether within or without the courthouse.

(C) When the early voting occurs at a facility other than the county clerk's office, no person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever in the building or within one hundred feet (100') of the primary exterior entrance used by voters to the building containing the polling place[.]

Ark. Code Ann. § 7-1-103(a)(9).

California

No person, on election day, or at any time that a voter may be casting a ballot, shall, within 100 feet of a polling place, a satellite location under Section 3018, or an elections official's office: (a) Circulate an initiative, referendum, recall, or nomination petition or any other petition. (b) Solicit a vote or speak to a voter on the subject of marking his or her ballot. (c) Place a sign relating to voters' qualifications or speak to a voter on the subject of his or her qualifications except as provided in Section

14240. (d) Do any electioneering as defined by Section 319.5. * * *

Cal. Elec. Code § 18370.

"Electioneering" means the visible display or audible dissemination of information that advocates for or against any candidate or measure on the ballot within 100 feet of a polling place, a vote center, an elections official's office, or a satellite location under Section 3018. Prohibited electioneering information includes, but is not limited to, any of the following: (a) A display of a candidate's name, likeness, or logo. (b) A display of a ballot measure's number, title, subject, or logo. (c) Buttons, hats, pencils, pens, shirts, signs, or stickers containing electioneering information. (d) Dissemination of audible electioneering information. * * *

Cal. Elec. Code § 319.5.

Colorado

No person shall do any electioneering on the day of any election, or during the time when voting is permitted for any election, within any polling location or in any public street or room or in any public manner within one hundred feet of any building in which a polling location is located, as publicly posted by the designated election official. As used in this section, the term "electioneering" includes campaigning for or against any candidate who is on the ballot or any ballot issue or ballot question that is on the ballot. "Electioneering" also includes soliciting signatures for a candidate petition, a recall petition, or a petition to place a ballot issue or ballot question on a subsequent ballot. "Electioneering" does not include a respectful display of the American flag.

Colo. Rev. Stat. Ann. § 1-13-714(1); see also Colo. Sec'y of State, *Election Crimes, Rules, and Penalties FAQs* (prohibiting "pins, t-shirts, hats, or other apparel that displays a preference for a candidate, political party, or ballot question"), https://www.sos.state.co.us/pubs/elections/FAQs/crimesRulesFAQ.html, (last visited Jan. 31, 2018).

Connecticut

On the day of any primary, referendum or election, no person shall solicit on behalf of or in opposition to the candidacy of another or himself or on behalf of or in opposition to any question being submitted at the election or referendum, or loiter or peddle or offer any advertising matter, ballot or circular to another person within a radius of seventy-five feet of any outside entrance in use as an entry to any polling place or in any corridor, passageway or other approach leading from any such outside entrance to such polling place or in any room opening upon any such corridor, passageway or approach. * * *

Conn. Gen. Stat. Ann. § 9-236(a).

Delaware

(a) No election officer, challenger or any other person within the polling place or within 50 feet of the entrance to the building in which the voting room is located shall electioneer during the conduct of the election. * * *

(d) For the purposes of this section the following definition shall apply: "Electioneering" includes political discussion of issues, candidates or partisan topics, the

wearing of any button, banner or other object referring to issues, candidates or partisan topics, the display, distribution or other handling of literature or any writing or drawing referring to issues, candidates or partisan topics, the deliberate projection of sound referring to issues, candidates or partisan topics from loudspeakers or otherwise into the polling place or the area within 50 feet of the entrance to the building in which the voting room is located.

Del. Code Ann. tit. 15, § 4942.

District of Columbia

No person shall canvass, electioneer, circulate petitions, post any campaign material or engage in any activity that interferes with the orderly conduct of the election within a polling place or within a 50-foot distance from the entrance and exit of a polling place. The Board, by regulation, shall establish procedures for determination and clear marking of the 50-foot distance.

D.C. Code Ann. § 1-1001.10(b)(2)(A).

Florida

(a) No person, political committee, or other group or organization may solicit voters inside the polling place or within 100 feet of the entrance to any polling place, a polling room where the polling place is also a polling room, an early voting site, or an office of the supervisor of elections where vote-by-mail ballots are requested and printed on demand for the convenience of electors who appear in person to request them. Before the opening of the polling place or early voting site, the clerk or

supervisor shall designate the no-solicitation zone and mark the boundaries.

(b) For the purpose of this subsection, the terms "solicit" or "solicitation" shall include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item. The terms "solicit" or "solicitation" may not be construed to prohibit exit polling.

Fla. Stat. Ann. § 102.031(4).

Georgia

No person shall solicit votes in any manner or by any means or method, nor shall any person distribute or display any campaign material, nor shall any person solicit signatures for any petition, nor shall any person, other than election officials discharging their duties, establish or set up any tables or booths on any day in which ballots are being cast: (1) Within 150 feet of the outer edge of any building within which a polling place is established; (2) Within any polling place; or (3) Within 25 feet of any voter standing in line to vote at any polling place.

Ga. Code Ann. § 21-2-414(a).

Hawaii

Within the appropriate boundary as established in subsection (a), and the building in which the polling place is located, the display or distribution of campaign

posters, signs, or other campaign materials for the purpose of soliciting votes for or against any person or political party or position on a question is prohibited. Any voter who displays campaign material in the polling place shall remove or cover that material before entering the polling place. The chief election officer may adopt rules pursuant to chapter 91 to address special circumstances regarding the display of campaign materials.

Haw. Rev. Stat. Ann. § 11-132(d); see also Haw. Code R. § 3-172-63 (prohibiting exhibiting or distributing "any communication which is in any way intended to directly or indirectly solicit, influence, or address any candidate race or question on the ballot..., [including on] clothing, button, hat, armband or other campaign material that is being exhibited by the person").

Idaho

On the day of any primary, general or special election, no person may, within a polling place, or any building in which an election is being held, or within one hundred (100) feet thereof: (a) Do any electioneering; (b) Circulate cards or handbills of any kind; (c) Solicit signatures to any kind of petition; or (d) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place.

Idaho Code Ann. § 18-2318(1); see also Idaho Code Ann. § 34-1012 ("Electioneering is prohibited at an early voting polling place as provided in section 18-2318, Idaho Code.").

Illinois

No person shall do any electioneering or soliciting of votes on primary day within any polling place or within one hundred feet of any polling place, or, at the option of a church or private school, on any of the property of that church or private school that is a polling place. * * *

10 Ill. Comp. Stat. Ann. 5/7-41(c).

Indiana

(a) As used in this section, "electioneering" includes expressing support or opposition to any candidate or political party or expressing approval or disapproval of any public question in any manner that could reasonably be expected to convey that support or opposition to another individual. The term includes wearing or displaying an article of clothing, sign, button, or placard that states the name of any political party or includes the name, picture, photograph, or other likeness of any currently elected federal, state, county, or local official. The term does not include expressing support or opposition to a candidate or a political party or expressing approval or disapproval of a public question in: (1) material mailed to a voter; or (2) a telephone or an electronic communication with a voter.

(b) A person who knowingly does any electioneering * * * on election day within * * * the polls * * * commits a Class A misdemeanor.

Ind. Code Ann. § 3-14-3-16.

Iowa

A person commits the crime of election misconduct in the third degree if the person willfully commits any of the following acts * * * on election day: (1) Loitering, congregating, electioneering, posting signs, treating voters, or soliciting votes, during the receiving of the ballots, either on the premises of a polling place or within three hundred feet of an outside door of a building affording access to a room where the polls are held, or of an outside door of a building affording access to a hallway, corridor, stairway, or other means of reaching the room where the polls are held. * * * (2) Interrupting, hindering, or opposing a voter while in or approaching the polling place for the purpose of voting.

Iowa Code Ann. § 39A.4(1)(a); see also Iowa Sec'y of State, *Election Day FAQ*, https://sos.iowa.gov/elections/voterinformation/edfaq.html (last visited Jan. 31, 2018) (permitting campaign button or clothing).

Kansas

Electioneering is knowingly attempting to persuade or influence eligible voters to vote for or against a particular candidate, party or question submitted. Electioneering includes wearing, exhibiting or distributing labels, signs, posters, stickers or other materials that clearly identify a candidate in the election or clearly indicate support or opposition to a question submitted election within any polling place on election day or advance voting site during the time period allowed by law for casting a ballot by advance voting or within a radius of 250 feet from the entrance thereof. Electioneering

shall not include bumper stickers affixed to a motor vehicle that is used to transport voters to a polling place or to an advance voting site for the purpose of voting.

Kan. Stat. Ann. § 25-2430(a).

Kentucky

(a) No person shall electioneer at the polling place on the day of any election, as established in KRS 118.025, within a distance of one hundred (100) feet of any entrance to a building in which a voting machine is located if that entrance is unlocked and is used by voters on election day.

(b) No person shall electioneer within the interior of a building or affix any electioneering materials to the exterior or interior of a building where the county clerk's office is located, or any building designated by the county board of elections and approved by the State Board of Elections for absentee voting, during the hours absentee voting is being conducted in the building by the county clerk pursuant to KRS 117.085(1)(c).

(c) Electioneering shall include the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any bona fide candidate or ballot question in a manner which expressly advocates the election or defeat of the candidate or expressly advocates the passage or defeat of the ballot question, but shall not include exit polling, bumper stickers affixed to a person's vehicle while parked within or passing through a distance of one hundred (100) feet of any entrance to a building in which a voting machine is located, private property as provided in subsection (7)

of this section, or other exceptions established by the State Board of Elections through the promulgation of administrative regulations.

Ky. Rev. Stat. Ann. § 117.235(3); see also 1984 Ky. Op. Atty. Gen. 2-102 (interpreting campaign buttons as not "signs").

Louisiana

A. The Legislature of Louisiana recognizes that the right to vote is a right that is essential to the effective operation of a democratic government. Due to a past, longstanding history of election problems, such as multiple voting, votes being recorded for persons who did not vote, votes being recorded for deceased persons, voting by non-residents, vote buying, and voter intimidation, the legislature finds that the state has a compelling interest in securing a person's right to vote in an environment which is free from intimidation, harassment, confusion, obstruction, and undue influence. The legislature, therefore, enacts this Subsection to provide for a six hundred foot campaign-free zone around polling places to provide to each voter such an environment in which to exercise his right to vote. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m., to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or during early voting, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or during early voting: (1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

* * * (3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever. (4) To place or display political signs, pictures, or other forms of political advertising. (5) To circulate a recall petition or seek handwritten signatures to a recall petition. * * *

D. No election official shall wear any badge, button, pin, or other insignia identifying him with any political candidate or faction.

La. Stat. Ann. § 18:1462; see also La. Sec'y of State, *Vote* (prohibiting "any campaign shirt, hat, and button or pin"), https://www.sos.la.gov/ElectionsAndVoting/Vote/Pages/default.aspx (last visited Jan. 31, 2018).

Maine

Advertising prohibited. A person may not display advertising material; operate an advertising medium, including a sound amplification device; or display or distribute campaign literature, posters, palm cards, buttons, badges or stickers containing a candidate's name or otherwise intending to influence the opinion of any voter regarding a candidate or question that is on the ballot for the election that day on any public property located within 250 feet of the entrance to either the voting place or the building in which the registrar's office is located. The term "sound amplification device" includes, but is not limited to, sound trucks, loudspeakers and blowhorns.

* * * This subsection does not apply to advertising material on automobiles traveling to and from the voting place for the purposes of voting. It does not prohibit

a person who is at the polls solely for the purpose of voting from wearing a campaign button when the longest dimension of the button does not exceed 3 inches.

Me. Stat. tit. 21-a, § 682(3).

Maryland

A person may not * * * canvass, electioneer, or post any campaign material in the polling place or beyond a line established by signs posted in accordance with subsection (b) of this section.

Md. Code Ann., Elec. Law § 16-206(a)(10); see also Md. State Bd. of Elections, *Summary Guide* at 70 (Aug. 2010), (prohibiting "clothing shirt, hat, sticker, or button that indicates support of or opposition to any candidate, question, or political party if worn by any person allowed to remain in the 'No Electioneering' zone. However, electioneering does not apply to a voter going to vote in his or her polling place. A person on his or her way to vote may wear campaign paraphernalia or carry campaign literature if the voter leaves the zone promptly after voting."), http://www.elections.state.md.us/pdf/summary_guide/summary_guide.pdf.

Massachusetts

At an election of state or city officers, and of town officers in towns where official ballots are used, * * * [no] poster, card, handbill, placard, picture or circular intended to influence the action of the voter shall be posted, exhibited, circulated or distributed in the polling place, in the building where the polling place is located,

on the walls thereof, on the premises on which the building stands, or within one hundred and fifty feet of the building entrance door to such polling place. * * *

Mass. Gen. Laws Ann. ch. 54, § 65.

Michigan

(1) * * * A person shall not place or distribute stickers, other than stickers provided by the election officials pursuant to law, in a polling room, in a compartment connected to a polling room, or within 100 feet from any entrance to a building in which a polling place is located. * * *

(3) On election day, a person shall not post, display, or distribute in a polling place, in any hallway used by voters to enter or exit a polling place, or within 100 feet of an entrance to a building in which a polling place is located any material that directly or indirectly makes reference to an election, a candidate, or a ballot question. Except as otherwise provided in section 744a, this subsection does not apply to official material that is required by law to be posted, displayed, or distributed in a polling place on election day.

Mich. Comp. Laws Ann. § 168.744 (footnote omitted); see also Mich. Sec'y of State, *Elections & Voting*, (prohibiting "election-related materials," including clothing, buttons, pamphlets, fliers and stickers), http://www.michigan.gov/sos/0,1607,7-127-29836-202488--F,00.html (last visited Jan. 31, 2018).

Minnesota

Soliciting near polling places. A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day. This section applies to areas established by the county auditor or municipal clerk for absentee voting as provided in chapter 203B.

Minn. Stat. Ann. § 211B.11(1).

Mississippi

No candidate for an elective office, or any representative of such candidate, and no proponent or opponent of any constitutional amendment, local issue or other measure printed on the ballot may post or distribute cards, posters or other campaign literature within one hundred fifty (150) feet of any entrance of the building wherein any election is being held. No candidate or a representative named by him or her in writing may appear at any polling place while armed or uniformed, or display any badge or credentials except as may be issued by the manager of the polling place. * * *

Miss. Code Ann. § 23-15-895.

Missouri

The following offenses, and any others specifically so described by law, shall be class four election offenses and are deemed misdemeanors not connected with the exercise of the right of suffrage. Conviction for any of these offenses shall be punished by imprisonment of not more than one year or by a fine of not more than two thousand five hundred dollars or by both such imprisonment and fine: * * * Exit polling, surveying, sampling, electioneering, distributing election literature, posting signs or placing vehicles bearing signs with respect to any candidate or question to be voted on at an election on election day inside the building in which a polling place is located or within twenty-five feet of the building's outer door closest to the polling place, or, on the part of any person, refusing to remove or permit removal from property owned or controlled by him, any such election sign or literature located within such distance on such day after request for removal by any person[.]

Mo. Ann. Stat. § 115.637(18).

Montana

(1) A person may not do any electioneering on election day within any polling place or any building in which an election is being held or within 100 feet of any entrance to the building in which the polling place is located that aids or promotes the success or defeat of any candidate or ballot issue to be voted upon at the election. * * *

(3) A person may not buy, sell, give, wear, or display at or about the polls on an election day any badge, button, or other insignia that is designed or tends to aid or promote the success or defeat of any candidate or ballot issue to be voted upon at the election.

Mont. Code Ann. § 13-35-211; see also Mont. Admin. R. 44.11.606 (prohibiting solicitation of support or opposition to candidate or ballot question by "[p]ersonal persuasion, electronic amplification of the human voice, or the display or distribution of campaign materials").

Nebraska

No person shall do any electioneering, circulate petitions, or perform any action that involves solicitation within any polling place or any building designated for voters to cast ballots by the election commissioner or county clerk pursuant to the Election Act while the polling place or building is set up for voters to cast ballots or within two hundred feet of any such polling place or building except as otherwise provided in subsection (3) of this section.

Neb. Rev. Stat. Ann. § 32-1524(2); see also Neb. Sec'y of State, *Voter Information Frequently Asked Questions*, ("Wearing political badges or any political insignia into the polling place on Election Day is against the law."), http://www.sos.ne.gov/elec/voter_info.html (last visited Jan. 31, 2018).

Nevada

1. Except as otherwise provided in subsection 2, it is unlawful inside a polling place or within 100 feet from

the entrance to the building or other structure in which a polling place is located: (a) For any person to solicit a vote or speak to a voter on the subject of marking the voter's ballot. (b) For any person, including an election board officer, to do any electioneering on election day. * * *

4. As used in this section, "electioneering" means campaigning for or against a candidate, ballot question or political party by: (a) Posting signs relating to the support of or opposition to a candidate, ballot question or political party; (b) Distributing literature relating to the support of or opposition to a candidate, ballot question or political party; (c) Using loudspeakers to broadcast information relating to the support of or opposition to a candidate, ballot question or political party; (d) Buying, selling, wearing or displaying any badge, button or other insigne which is designed or tends to aid or promote the success or defeat of any political party or a candidate or ballot question to be voted upon at that election; or (e) Soliciting signatures to any kind of petition.

Nev. Rev. Stat. Ann. § 293.740.

New Hampshire

No person shall distribute, wear, or post at a polling place any campaign material in the form of a poster, card, handbill, placard, picture, pin, sticker, circular, or article of clothing which is intended to influence the action of the voter within the building where the election is being held.

N.H. Rev. Stat. Ann. § 659:43(I).

New Jersey

No person shall display, sell, give or provide any political badge, button or other insignia to be worn at or within one hundred feet of the polls or within the polling place or room, on any primary, general or special election day or on any commission government election day, except the badge furnished by the county board as herein provided. * * *

N.J. Stat. Ann. § 19:34-19.

New Mexico

A. Electioneering too close to the polling place consists of any form of campaigning within: (1) one hundred feet of the building in which the polling place is located on election day when voting at a school, church or private residence; and (2) one hundred feet of the door through which voters may enter to vote at the office of the county clerk, an alternate voting location, a mobile voting site or any location used as a polling place on election day that is not a school, church or private residence.

B. Electioneering includes the display or distribution of signs or campaign literature, campaign buttons, t-shirts, hats, pins or other such items and includes the verbal or electronic solicitation of votes for a candidate or question.

N.M. Stat. Ann. § 1-20-16.

New York

* * * While the polls are open no person shall do any electioneering within the polling place, or in any public

street, within a one hundred foot radial measured from the entrances designated by the inspectors of election, to such polling place or within such distance in any place in a public manner; and no political banner, button, poster or placard shall be allowed in or upon the polling place or within such one hundred foot radial. * * *

N.Y. Election Law § 8-104(1).

North Carolina

(a) Buffer Zone.--No person or group of persons shall hinder access, harass others, distribute campaign literature, place political advertising, solicit votes, or otherwise engage in election-related activity in the voting place or in a buffer zone which shall be prescribed by the county board of elections around the voting place. * * *

(b) Area for Election-Related Activity.--Except as provided in subsection (b) of this section, the county board of elections shall also provide an area adjacent to the buffer zone for each voting place in which persons or groups of persons may distribute campaign literature, place political advertising, solicit votes, or otherwise engage in election-related activity.

N.C. Gen. Stat. Ann. § 163A-1134.

North Dakota

No individual may buy, sell, give, or provide any political badge, button, or any insignia within a polling place or within one hundred feet [30.48 meters] from the entrance to the room containing the polling place while it is open for voting. No such political badge, button, or

insignia may be worn within that same area while a polling place is open for voting.

N.D. Cent. Code Ann. § 16.1-10-03.

Ohio

During an election and the counting of the ballots, no person shall do any of the following: (1) Loiter, congregate, or engage in any kind of election campaigning within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place, and if the line of electors waiting to vote extends beyond those small flags, within ten feet of any elector in that line; (2) In any manner hinder or delay an elector in reaching or leaving the place fixed for casting the elector's ballot; (3) Give, tender, or exhibit any ballot or ticket to any person other than the elector's own ballot to the precinct election officials within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place, and if the line of electors waiting to vote extends beyond those small flags, within ten feet of any elector in that line; (4) Exhibit any ticket or ballot which the elector intends to cast; (5) Solicit or in any manner attempt to influence any elector in casting the elector's vote.

Ohio Rev. Code Ann. § 3501.35(A); see also Ohio Sec'y of State, *Precinct Election Official Manual* at 45 (Jul. 2017) (prohibiting "all campaign garb and paraphernalia"), https://www.sos.state.oh.us/globalassets/elections/eoresources/peo-training/peomanual-2017general.pdf.

Oklahoma

No person shall be allowed to electioneer within three hundred (300) feet of any ballot box while an election is in progress, nor shall any person or persons, except election officials and other persons authorized by law, be allowed within fifty (50) feet of any ballot box while an election is in progress. No printed material other than that provided by the election board shall be publicly placed or exposed within three hundred (300) feet of any ballot box, while an election is in progress.

Okla. Stat. tit. 26, § 7-108.

Oregon

A person may not do any electioneering, including circulating any cards or handbills, or soliciting of signatures to any petition, within any building in which any state or local government elections office designated for the deposit of ballots under ORS 254.470 is located, or within 100 feet measured radially from any entrance to the building. A person may not do any electioneering by public address system located more than 100 feet from an entrance to the building if the person is capable of being understood within 100 feet of the building. The electioneering need not relate to the election being conducted. This subsection applies during the business hours of the building or, if the building is a county elections office, during the hours the office is open to the public, during the period beginning on the date that ballots are mailed to electors as provided in ORS 254.470 and ending on election day at 8 p.m. or when all persons

waiting in line at the building who began the act of voting as described in ORS 254.470 (10) by 8 p.m. have finished voting.

Or. Rev. Stat. Ann. § 260.695(2); see also Or. Sec'y of State, *Election Law Summary* at 42 (March 2016) ("The electioneering ban does not apply to the wearing of political buttons or other insignia (t-shirts, caps, etc.) which relate to the election in a polling place in a county clerk's office."), http://sos.oregon.gov/elections/Documents/elec_law_summary.pdf.

Pennsylvania

No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act.

25 Pa. Stat. Ann. § 3060(c).

Rhode Island

No poster, paper, circular, or other document designed or tending to aid, injure, or defeat any candidate for public office or any political party on any question submitted to the voters shall be distributed or displayed within the voting place or within fifty (50) feet of the entrance or entrances to the building in which voting is conducted at any primary or election. Neither shall any election official display on his or her person within the voting place any political party button, badge, or other device tending to aid, injure, or defeat the candidacy of

any person for public office or any question submitted to the voters or to intimidate or influence the voters.

17 R.I. Gen. Laws Ann. § 17-19-49; see also R.I. Bd. Of Elections, *Official Pollworker Manual* at 28 (2016) ("Voters are allowed to wear political campaign materials like buttons, pins, shirts, etc. However, they are expected to vote and leave the polling place."), http://www.elections.ri.gov/publications/Election_Publications/Pollworker_Training/REVISED%20Pollworker%20Training%20Guide%202016%20General%20REVISED.pdf.

South Carolina

(A) It is unlawful on an election day within two hundred feet of any entrance used by the voters to enter the polling place for a person to distribute any type of campaign literature or place any political posters. The poll manager shall use every reasonable means to keep the area within two hundred feet of any such entrance clear of political literature and displays, and the county and municipal law enforcement officers, upon request of a poll manager, shall remove or cause to be removed any material within two hundred feet of any such entrance distributed or displayed in violation of this section.

(B) A candidate may wear within two hundred feet of the polling place a label no larger than four and one-fourth inches by four and one-fourth inches that contains the candidate's name and the office he is seeking. If the candidate enters the polling place, he may not display any of this identification including, but not limited to, campaign stickers or buttons.

S.C. Code Ann. § 7-25-180; see also S.C. Election Comm'n, *Poll Managers Handbook* at Appendix-2 (April 2016) (prohibiting campaign materials, including but not limited to "buttons, hats, pins, t-shirts, literature, posters, signs," and "[a]ny material that advertises a candidate or political party"), https://www.scvotes.org/files/PMHandbook/SEC%20MNL%201100-201604%20Poll%20Managers%20Handbook.pdf.

South Dakota

Except for sample ballots and materials and supplies necessary for the conduct of the election, no person may, in any polling place or within or on any building in which a polling place is located or within one hundred feet from any entrance leading into a polling place, maintain a campaign office or public address system, or use any communication or photographic device in a manner which repeatedly distracts, interrupts, or intimidates any voter or election worker, or display campaign posters, signs, or other campaign materials or by any like means solicit any votes for or against any person or political party or position on a question submitted or which may be submitted. No person may engage in any practice which interferes with the voter's free access to the polls or disrupts the administration of the polling place, or conduct any petition signature gathering, on the day of an election, within one hundred feet of a polling place. For the purposes of this section, the term, polling place, means a designated place voters may go to vote on the day of the election or go to vote absentee. A violation of this section is a Class 2 misdemeanor.

S.D. Codified Laws § 12-18-3; see also S.D. Sec'y of State, *Election Day Precinct Manual* at 20 (Oct. 27, 2017) (prohibiting poll watchers and observers from wearing buttons or clothing that contain campaign information), https://sdsos.gov/elections-voting/assets/2017PrecinctManual.pdf.

Tennessee

(1) Within the appropriate boundary as established in subsection (a), and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person, political party, or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building in which a polling place is located. * * *

(3) Nothing in this section shall be construed to prohibit any person from wearing a button, cap, hat, pin, shirt, or other article of clothing outside the established boundary but on the property where the polling place is located.

Tenn. Code Ann. § 2-7-111(b).

Texas

[A] person may not wear a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election, in the polling place or within 100 feet of any outside door through which a

voter may enter the building in which the polling place is located.

Tex, Election Code Ann. § 61.010(a); see also Tex. Sec'y of State, *Qualifying Voters on Election Day* at 50 (Jul. 2017) (prohibiting wearing of a badge or other insignia, including a button, regarding a candidate, measure, or political party, or the conduct of the election), http://www.sos.state.tx.us/elections/forms/election_judges_handbook.pdf.

Utah

(1) As used in this section:

(a) "electioneering" includes any oral, printed, or written attempt to persuade persons to refrain from voting or to vote for or vote against any candidate or issue; and

(b) "polling place" means the physical place where ballots and absentee ballots are cast and includes the county clerk's office or city hall during the period in which absentee ballots may be cast there.

(2)(a) A person may not, within a polling place or in any public area within 150 feet of the building where a polling place is located:

(i) do any electioneering;

(ii) circulate cards or handbills of any kind;

(iii) solicit signatures to any kind of petition; or

(iv) engage in any practice that interferes with the freedom of voters to vote or disrupts the administration of the polling place.

Utah Code Ann. § 20A-3-501.

Vermont

The presiding officer shall ensure during polling hours on the day of the election that * * * [w]ithin the building containing a polling place, no campaign literature, stickers, buttons, name stamps, information on write-in candidates, or other political materials are displayed, placed, handed out, or allowed to remain[.]

Vt. Stat. Ann. tit. 17 § 2508(a)(1); Vt. Sec'y of State, *Voting Information Frequently Asked Questions* (prohibiting "shirt or button," or other "candidate paraphernalia"), https://www.sec.state.vt.us/elections/frequently-asked-questions/voting-information.aspx (last visited Feb. 1, 2018).

Virginia

A. During the times the polls are open and ballots are being counted, it shall be unlawful for any person (i) to loiter or congregate within 40 feet of any entrance of any polling place; (ii) within such distance to give, tender, or exhibit any ballot, ticket, or other campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote; or (iii) to hinder or delay a qualified voter in entering or leaving a polling place. * * *

K. The provisions of subsections A and D shall not be construed to prohibit a person who approaches or enters

the polling place for the purpose of voting from wearing a shirt, hat, or other apparel on which a candidate's name or a political slogan appears or from having a sticker or button attached to his apparel on which a candidate's name or a political slogan appears. This exemption shall not apply to candidates, representatives of candidates, or any other person who approaches or enters the polling place for any purpose other than voting.

Va. Code Ann. § 24.2-604.

Washington

During the voting period that begins eighteen days before and ends the day of a special election, general election, or primary, no person may:

(a) Within a voting center:

(i) Suggest or persuade or attempt to suggest or persuade any voter to vote for or against any candidate or ballot measure;

(ii) Circulate cards or handbills of any kind;

(iii) Solicit signatures to any kind of petition; or

(iv) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the voting center[.]

Wash. Rev. Code Ann. § 29A.84.510(1).

West Virginia

(a) As used in this section, "electioneering" means the displaying of signs or other campaign paraphernalia,

the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any bona fide candidate or ballot question in a manner which expressly advocates the election or defeat of the candidate or expressly advocates the passage or defeat of the ballot question. "Electioneering" does not include exit polling, so long as persons conducting exit polling are not otherwise engaging in electioneering activities described above, or bumper stickers or signs affixed to a person's vehicle which is parked within or passing through a distance of one hundred feet of the entrance to a polling place while such person is voting or transporting any voter to the polls. * * *

(c) No person may do any electioneering on election day within any polling place, or within one hundred feet of the outside entrance to the building housing the polling place. No person may do any electioneering in the polling place or within one hundred feet of the outside entrance of any polling place where early voting is conducted during the period in which early voting is offered during the hours while such early voting is actually taking place. Nothing in this subsection shall prohibit a citizen from doing any electioneering upon his or her own private property, regardless of distance from the polling place, so long as that electioneering conforms to other existing laws and ordinances.

W. Va. Code Ann. § 3-9-9.

Wisconsin

(2)(a)1. No person may engage in electioneering during polling hours on election day at a polling place. * * *

(4) In this section, "electioneering" means any activity which is intended to influence voting at an election.

Wis. Stat. Ann. § 12.03; see also Wisconsin Elections Commission, *Top 10 Things Wisconsin Voters Need to Know for the April 5 Spring Election and Presidential Preference Primary* (Mar. 24, 2016) ("Voters should not wear political clothing or paraphernalia to the polling place on Election day."), http://elections.wi.gov/node3909.

Wyoming

Electioneering too close to a polling place or absentee polling place under W.S. 22-9-125 when voting is being conducted, consists of any form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing or polling of voters, except exit polling by news media, within one hundred (100) yards of the building in which the polling place is located.

Wyo. Stat. Ann. § 22-26-113.

No. 16-1435

In The
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE;
ANDREW E. CILEK; and SUSAN JEFFERS,
Petitioners,

v.

JOE MANSKY, in his official capacity as Elections Manager for Ramsey County; VIRGINIA GELMS, in her official capacity as Elections Manager for Hennepin County; MIKE FREEMAN, in his official capacity as Hennepin County Attorney; JOHN CHOI, in his official capacity as Ramsey County Attorney; and STEVE SIMON, in his official capacity as Secretary of State of Minnesota,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTRODUCTION

In the Respondents' brief (RB), the Government engages in the impossible task of minimizing the reach and constitutionally burdensome nature of Minn. Stat. Section 211B.11(1)'s ban on political apparel. It is undisputed that the variety of available political apparel—and the messages and logos that it conveys—is almost endless in today's society. It is also undisputed that people communicate through political apparel for many reasons, including purely for self-expression and identification of associational interests. Since Section 211B.11(1) prohibits all or almost all of this constitutionally protected speech in polling places on election days and for 46 days before at absentee voting locations, the ban is substantially overbroad and unconstitutional under a straightforward application of the First Amendment overbreadth doctrine.

The Government asserts three primary arguments to escape this conclusion: (1) it offers a last-minute attempt to re-define and narrow the term "political," (2) argues that Section 211B.11(1) survives under a "reasonableness" analysis, and (3) requests certification to the Minnesota Supreme Court. All lack merit. Nothing in the statute's text or the Government's prior, official constructions of the political apparel ban limit the ordinary and broad meaning of the term "political." The Government's attempt to reverse course now is improper and unpersuasive.

Its approach to the merits of the case suffers from the same defects. This is a First Amendment overbreadth case, not an ordinary, more limited, facial challenge. As such, it can and should be resolved

based on the extreme degree to which Section 211B.11(1) intrudes on protected, passive political speech, and the lack of obvious legitimate applications. *United States v. Stevens*, 559 U.S. 460, 472-73, 480 (2010); *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575-76 (1987). But even assuming a "reasonableness" test is pertinent, the statute is overbroad under that inquiry because it prohibits tremendous amounts of passive political self-expression and association that lacks any reasonable connection to the voter "disruption" and "intimidation" concerns underlying the statute.

Finally, in light of the nature and circumstances of this dispute, certification of this case to a state court is not an available or proper resolution to the controversy. Section 211B.11(1) must be declared facially invalid.

ARGUMENT

I.

THE GOVERNMENT CANNOT REDEFINE THE TERM "POLITICAL" NOW

Throughout this controversy, the Government contended that the term "political" in Section 211B.11(1) includes all views and groups that can be classified as political. 2011 Brief of Appellee Ritchie at 10 n.1 ("political" includes all political speech); *id.* at 11 ("Section 211B.11 applies to the entire class of badges, buttons and insignia that constitute political speech"); 2011 Brief of Appellee Mansky at 14 (statute bars "any politicization"). It did so out of deference to the statute's plain language and to avoid charges of viewpoint discrimination. But before this Court, the

Government seeks to redefine "political" to mean only messages "relating to questions of governmental affairs facing voters on a given election day." RB at 19.

This reformulation cannot be accepted. First, nothing in Section 211B.11(1)'s plain language limits the reach of the third sentence to only certain types of political material; it unreservedly covers all "political" insignia. Second, the Government's official election guidance materials confirm the broad meaning of the term, and that it goes beyond issues on the ballot. The Election Day Policy, which the Government concedes must be viewed as an authoritative construction, RB at 17, construes "political" to include: (1) "issue-oriented material designed to influence or impact voting," (2) "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, *and so on*)," and (3) current and past material referring to candidates, parties, or ballot issues. Pet. App. I-1-2 (emphasis added). Other documents from the Minnesota Secretary of State's Office add that "political" includes all "partisan references." Docket Entry (DE) at 20 (Appendix A to Declaration of Gary Poser). The Policy carefully notes that "political" apparel is "*not limited to*" the items in the Policy. *Id.* at I-1 (emphasis added).

This is more than enough to confirm the term "political" in Section 211B.11(1) includes all political expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973) ("[A] court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute."). Indeed, every court that has considered the issue has so construed the statute, Pet. App. E-15 (district court finds it bars "all manner of political views"); *id.* A-6 (Eighth Circuit: "all political

material is banned"), and those constructions are entitled to deference. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

Given the statutory text, the Government's policies and enforcement practices,[1] and the lower courts' decisions, the term "political" in Section 211B.11(1) cannot be construed to cover only an amorphous subset of speech related to "governmental affairs" at issue in an election. *Id.* It is little surprise, then, that the Government never previously advanced this definition. Its attempt to do so now is telling and futile. *Stevens*, 559 U.S. at 480 (The Government's claim that a law will be enforced "more restrictively than its language [allows] is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading."); *Bell v. Wolfish*, 441 U.S. 520, 561 n.42 (1979) (in determining scope of a rule, "we consider the rule in its present form and in light of the concessions made by [the government]"); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128-29 (2011) ("Arguments thus omitted [in prior briefing] are normally considered waived.").

Finally, upon examination, the Government's attempt to limit the term "political" to "governmental" concerns generally at issue in an election is not much of a change at all. The definition is so vague that it allows and invites unpredictable and broad enforcement—including to all things "political."

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[1] Petitioners' banned Tea Party shirts included no messages about governmental choices on the ballot. The shirts merely displayed political ideologies ("Don't Tread on Me," "Liberty") and a small group identification (the Tea Party logo). Pet. App. B-25.

Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (ambiguous meanings cause citizens to "'steer far wider of the unlawful zone,' than if the boundaries of the forbidden areas were clearly marked." (citation omitted)). The meaninglessness of the Government's shift is further confirmed by the fact that the Government fails to argue that any of the examples of "political" messages in the Policy or in MVA's brief would not qualify as political material under its new "governmental issues facing voters on election day" definition. Petitioners' Brief on the Merits at 24-28.

For all these reasons, the Court should analyze Section 211B.11(1) in light of the ordinary, broad meaning of the term "political," a meaning the Government accepted and promoted at all times relevant to this controversy.

II.

THE GOVERNMENT FAILS TO JUSTIFY ITS BROAD BAN ON ALL POLITICAL APPAREL

Despite the broad reach of its "political" apparel ban, the Government contends that Section 211B.11(1) is not facially unconstitutional because it reasonably advances governmental interests in "'maintain[ing] peace, order and decorum' in the polling place, 'protecting voters from confusion and undue influence' such as intimidation, and 'preserving the integrity of its election process.'" RB at 41. This position does not reflect the relevant inquiry and fails on its own terms.

A. This Case May Be Resolved on the Basis of Whether Section 211B.11(1) Burdens a "Substantial" Amount of "Protected" Speech

MVA's facial claim was litigated below under the First Amendment overbreadth doctrine, Pet. App. D-5, 10, the Petition for Certiorari presented that doctrine, and the Government's Opposition to the Petition addressed it. Pet. Opp. 11-15. Thus, the sole claim here is a facial one arising under the overbreadth doctrine.[2] Nevertheless, the Government seeks to litigate this case as a standard facial challenge; i.e., one largely constrained by the facts and parties in the case and resolved through means-ends testing. RB at 38; *see, e.g., Burson v. Freeman*, 504 U.S. 191, 198-99 (1992).

This approach is improper here, or at least very incomplete, because it gives short shrift to the standards and concerns of the First Amendment overbreadth doctrine. *See Stevens*, 559 U.S. at 472-73. That doctrine articulates a special, independent framework for facially scrutinizing a restriction that may burden the free speech rights of parties not before the Court. *Id.*; *New York v. Ferber*, 458 U.S. 747, 767-73 (1982). An affected plaintiff can invoke the doctrine regardless of the status of the plaintiff's as-applied claims, *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-58 (1984); *Jews for Jesus*, 482 U.S. at 574-76 (adjudicating a facial overbreadth

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[2] MVA agrees that MVA's as-applied claims are not before this Court, because MVA did not appeal a portion of the District Court's adverse ruling on those claims to the Eighth Circuit, Pet. App. A-1-7, and did not raise any as-applied claims in the Petition for Certiorari. Pet. at 9.

claim before resolution of an as-applied claim); or the nature of the forum in which the challenged law applies. *Id.* (applying doctrine in an airport without regard for whether it was a public or non-public forum); *Virginia v. Hicks*, 539 U.S. 113, 115-17 (2003) (applying doctrine to a rule regulating government-run housing, a non-public forum).

The test that governs claims, like that here, arising under the First Amendment overbreadth doctrine is whether the statute "prohibits a substantial amount of protected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Some decisions add that any burden on protected speech should be judged in relation to the law's "plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008).

A critical aspect of this standard is whether the speech affected by a challenged statute is constitutionally "protected." When it is, the overbreadth inquiry often hinges on the extent to which the subject statute intrudes upon the protected speech. *See Free Speech Coalition*, 535 U.S. at 255 ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (Substantial overbreadth only requires "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."). When the intrusion is extensive and plain, and legitimate

applications of the law are not, the Court may resolve the case based on the law's overreach, without searching analysis designed to map-out the statute's legitimate scope. *Stevens*, 559 U.S. at 472-73; *Jews for Jesus*, 482 U.S at 575; *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

Given the overbreadth doctrine's focus on the free speech rights of parties not before the Court, the inquiry into a law's reach "take[s] into account possible applications of the statute in other factual contexts besides that at bar." *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963); *see also*, *Free Speech Coalition*, 535 U.S. at 247-48 (concluding, in an overbreadth case, that Shakespeare's *Romeo and Juliet* and the movie *Traffic* potentially fell within the reach of a child pornography prohibition); *Reno v. ACLU*, 521 U.S. 844, 878 (1997) (positing that the Communications Decency Act may "extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library" in holding it overbroad).

Here, the passive political speech prohibited by Section 211B.11(1) is plainly "protected" speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (political speech is at "the core of the protection afforded by the First Amendment"); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (striking down a law preventing a display of a flag in "opposition to organized government"). In *Cohen*, *Tinker*, and *Jews for Jesus*, this Court confirmed that protection for

passive political speech extends to non-public forums.[3] *Jews for Jesus* explicitly states: "the wearing of a T-shirt or button that contains a political message . . . is still *protected speech even in a nonpublic forum*." 482 U.S. at 576 (emphasis added) (citing *Cohen v. California*, 403 U.S. 15 (1971)); *see also*, *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013) (political apparel is a "clearly established" right in non-public forums).

Given the protected nature of the speech at issue here, MVA's overbreadth challenge to Section 211B.11(1) depends largely on the statute's reach into that area of speech. As MVA's opening brief showed, the provision swallows the entire realm of passive political self-expression and advocacy. Petitioners' Brief on the Merits at 23-30; Pet. App. I-1-2. The Government's contrary assertions notwithstanding, RB at 54, the vague reach of the term "political" confirms and extends the statute's overbreadth.[4] *Baggett*, 377 U.S. at 372; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982) ("The vagueness of a law affects

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[3] MVA acknowledges that polling places are non-public forums, but contends that this is irrelevant to the analysis, *see* footnote 5, *infra*. Moreover, this acknowledgement is not meant to, and does not, concede that "reasonableness" review controls here. *See* footnote 8, *infra*.

[4] The Government's claim that MVA cannot point to vagueness because it did not bring a separate vagueness challenge is not consistent with the First Amendment overbreadth doctrine. Vagueness is always a relevant factor in that context. *United States v. Williams*, 553 U.S. 285, 304 (2008) (The Court has permitted "plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.").

overbreadth analysis."). Section 211B.11(1) intrudes on an entire class of important, protected speech. Conversely, the law has little "plainly legitimate" application beyond categorically unprotected speech, like "fighting words." This case does not present a close call on overbreadth. As a result, the statute can and should be held unconstitutionally overbroad without analysis designed to find and carve out a few possibly legitimate applications.[5] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017); *Stevens*, 559 U.S. at 474-82; *Lewis*, 415 U.S. at 133.

B. Section 211B.11(1) Fails to Reasonably Advance the Government's Interests in a Substantial Number of Applications

In contrast to the foregoing analysis, the Government seeks to directly apply the "reasonableness" and "viewpoint neutrality" tests often associated with non-public forums to decide whether Section 211B.11(1) is facially unconstitutional. This approach overlooks the "substantial burden on protected speech" standard in the overbreadth doctrine and unnecessarily complicates this case.[6] *Stevens*, 559 U.S. at 472-73.

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[5] Under this path to resolution of this case, it is unnecessary for this Court to apply forum analysis and/or to decide what First Amendment mean-ends test applies in this matter based on that analysis. *See* footnotes 3, *supra*, and 8, *infra*.

[6] The Government fails to recognize that the possibility of some legitimate applications will not save a speech restriction in an overbreadth case if the statute also frustrates a substantial amount of protected speech. *Stevens*, 559 U.S. at 472-73, 481; *Ashcroft*, 535 U.S. at 244, 255. That is why overbreadth analysis often focuses on, and is resolved based on, a law's *impermissible* reach. *Id.*

However, even assuming the Government's approach is relevant, it cannot save Section 211B.11(1) because the statute does not reasonably advance the Government's interests in a substantial number of applications.[7] Put another way, the Government's election interests do not reasonably justify its sweeping ban on political apparel.[8] *United States v. Grace*, 461 U.S. 171, 187 (1983) (Marshall, J., conc. in part, dis. in part) ("So sweeping a prohibition [on display of flags, banners and devices] is scarcely necessary to protect the operations of this Court . . . .").

1. A Total Political Apparel Ban Does Not Reasonably Advance the Interest in Focused and Smooth Voting

The Government contends that Section 211B.11(1) reasonably advances peace and order at polling places for two reasons: (1) it ensures "voters are focused on the voting activity; that election judges can focus on their tasks, rather than policing altercations and disturbances," and that "the voting process inside the polling place runs smoothly;" and it (2) protects against "verbal disputes or even physical

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[7] The Government implicitly concedes that such a conclusion would render the statute overbroad and unconstitutional. RB at 38 (The statute is not overbroad if "considering *all its applications*, [it] is reasonably tailored to further the State's interests . . . ." (emphasis added)).

[8] Alternatively, the Court should analyze the statute under strict scrutiny because (regardless of forum considerations) that standard, not reasonableness review, is a more appropriate test given the political and categorical nature of the speech restriction here. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 67 (1981) ("exclusion of a broad category" of speech demands heightened scrutiny).

altercations" that may arise from political apparel. RB at 42-43. These claims fail.

It is true that the Government has a legitimate interest in maintaining an efficient and focused voting process. But this interest does not reasonably justify Section 211B.11(1) because most of the passive political speech it prohibits does not reasonably implicate the interest. The passive nature of the speech alone deeply undercuts the strength of the "peace" interest. This case does not deal with yelling, picketing, marching, leafletting, or other types of active speech that might reasonably threaten a calm environment. It is concerned with expression that is totally silent, and thus, highly unlikely to attract attention. *Hodge v. Talkin*, 799 F.3d 1145, 1169 (D.C. Cir. 2015) ("The passive bearing of [such] a logo or name on a t-shirt, without more, normally would not cause the public to pause and take notice . . . ."); *see also*, *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (passive nature of a monument limited its effect on others).

Further, substantial amounts of the passive political messaging prohibited by Section 211B.11(1) is ordinary, common, and noncontroversial expression that raises no reasonable threat of diverting voters or election officials. Perhaps the clearest example is the ban on "group[s] with recognizable political views," Pet. App. I-1-2, which bars the identification of innumerable mainstream organizations, like "NAACP," "Chamber of Commerce," "AFL-CIO," and "ACLU." *See* Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part). Clothing displaying the names of these and similar associations is ubiquitous in society. It poses no stumbling block to voters continuing on

with their business in polling places, and the Government has no evidence it has such an effect. *See, e.g., Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505, 514 (1969).

To heighten the perceived risk of voter distraction, the Government imagines a "bombardment" of constant, campaign-like political messaging by individuals and coordinated groups. RB at 42-43. But this vision is plausible only if one ignores the many other, unchallenged polling places regulations that directly and effectively control the voting environment. Under these regulations, voters cannot loiter in polling places in groups or alone with apparel on display. Opp. at 30 (citing Minn. Stat. § 204C.06). No one can approach voting booths. Minn. Stat. § 204C.06(2). Soliciting and other interactive campaigning is prohibited. *Id.* § 211B.11(1). People must vote and leave. *Id.* § 204C.06(1). The existence of this regime means that the political apparel ban rests on the alleged need to wipe out the infinitesimal threat of distraction that allegedly arises from political apparel, after enforcement of other restrictions directly securing order and space for voters. This minimal interest is further reduced by the fact that voters can go quickly into their private voting booth, avert their eyes, or vote early by absentee ballot[9] to avoid the fleeting presence of political

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[9] Minnesota allows and encourages absentee and early voting by mail. https://www.sos.state.mn.us/elections-voting/other-ways-to-vote/ (last visited Feb. 13, 2108). Nearly 30% of voters 65 and older voted absentee in the 2016 election. http://www.sos.state.mn.us/election-admininistration-campaigns/data-maps/historical-voter-turnout-statistics/ (last visited Feb. 13, 2018).

apparel. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975) ("[T]he burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'") (citation omitted). There is neither a harassing campaigner nor captive audience problem here. *Spence v. Wash.*, 418 U.S. 405, 414 (1974). It defies all logic to claim that banning clothing that silently conveys an easily avoided political expression for a few minutes, in a context that already ensures privacy for voters, is reasonably required for "peace and decorum."

2. A Total Ban Does Not Reasonably Address the Speculative Fear of Disruption

Also without merit is the Government's claim that a total ban on political apparel reasonably serves the need to avoid "disruptions" and "altercations" in polling places. It points to the possibility of people wearing "aggressive, vulgar, or racially targeted campaign and political messages." RB at 46. Certain amici warn of the presence of Nazi and KKK material. To the extent this small subset of speech amounts to "fighting words" and "true threats," it can already be prohibited under the state's police powers. But Section 211B.11(1) prohibits much more than categorically unprotected speech. It prohibits all other types of political self-expression and association as well, like shirts that say "MoveON.org," Pet. App. I-1-2, or "Minnesota Vikings." JA at 56 ¶ 9. These items raise no reasonable risk of a disruption. *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson County School Dist. No. 9*, Nos. 15-35704, 15-35972, 2018 WL 560527 (9th Cir. Jan. 26, 2018) (an anti-picketing policy that banned inflammatory signs did not reasonably serve the goal

of preventing "disruption of classes" because it also banned non-inflammatory ones).

The Government's contrary position rests on nothing but speculative, unsupported fear. It has no evidence that a political shirt or hat ever triggered a disruption in Minnesota polling places or any other state. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("The Court ha[s] never accepted mere conjecture [from the government] as adequate to carry a First Amendment burden"). It references fights in two out-of-state news stories, RB at 44 & n.22, but the altercations there *did not arise from apparel and they were not in polling places*. They arose from active electioneering outside polling places, something not at issue here. "Generalized fear of 'disruption' is not enough" to restrict speech, even in a nonpublic forum. *Eagle Point Educ. Ass'n*, 2018 WL 560527, at *7; *see also Tinker*, 393 U.S. at 514. But that is all the Government can point to. *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (A "'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms.").

Still, the Government requests deference to its fears because "[t]ensions may well be running high [at polling places], particularly when the election has been a contentious one, or the issues at stake are particularly momentous." RB at 43. This does not elevate its fears enough to justify a broad ban on political apparel. That ban applies in all polling places, rural and urban, large and small, including absentee ballot stations open for 46 days prior to an election, Minn. Stat. §§ 211B.11(1), 203B.081(1), without respect to the nature of the election or the

psychological atmosphere. Moreover, peaceful political speech is *most* valued and protected in times of "tension." *Cohen v. California*, 403 U.S. at 24-25. The Vietnam War era was marked by tension and even violence and yet this Court confirmed that the First Amendment right to controversial self-expression outweighs any fears of a potential disruption. *See id.*; *Tinker*, 393 U.S. at 508, 514. The principle has not lost its force with time.[10]

C. Banning All Political Apparel Does Not Reasonably Address the Danger of Voter Intimidation

The Government also fails to support its claim that banning political apparel reasonably advances the goal of protecting voters from "undue influence," which it defines as "confusion" and "intimidation."[11]

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[10] The Government's suggestion that political speech on apparel may impede the work of election judges derives from its fear that such apparel will trigger voter disturbances that judges must constrain. RB at 42 ("judges [must be able to] focus on their tasks, rather than policing . . . disturbances"). But since fear of speculative disturbance does not reasonably justify banning all political apparel, the ancillary and even more disconnected fear that judges might have to police those speculative disturbances fails as well.

[11] The Government declines to claim that banning political apparel is justified by a need to shield voters from any generalized influence arising from political apparel as this is tantamount to saying the Government has a valid interest in protecting people from free speech itself. It does not. *Sorrell v. IMS Health, Inc.*, 564 U.S. 553, 576 (2011) ("[T]he fear that speech might persuade provides no lawful basis for quieting it."); *Citizens United v. FEC*, 558 U.S. 310, 382 (2010) ("A speaker's ability to persuade . . . provides no basis for government regulation of free and open public debate on what the laws should be."); *Mills v. Alabama*, 384 U.S. 214, 219-20 (1966) (striking

RB at 44; *see also United States v. CIO*, 335 U.S. 106, 143 (1948) (Rutledge, J., concurring) ("undue influence" refers to "disproportionate sway" and "bloc power"). For support, it points to *Burson*, asserting that the case holds "that a state statute prohibiting display of campaign materials in the public forum outside the polling place is justified by the interest in avoiding voter intimidation and confusion. The same concerns exist to an even greater extent inside the polling place . . . ." RB at 44 (citation omitted).

This view is flawed in two important ways. First, *Burson* did not hold that the goal of preventing voter intimidation justified a prohibition on the passive, silent, and fleeting display of campaign speech. It held that such an interest justified banning campaign workers from *interacting with, and soliciting*, people entering the polling place. 504 U.S. at 211; *Packingham*, 137 S. Ct. at 1737-38. Second, unlike *Burson*, Section 211B.11(1) is not limited to "*campaign* material." The law at issue here bars that *and* all other "political" expression. *Burson* offers no support for the claim that banning passive political speech on apparel is reasonable to prevent voter intimidation.

The Government's final effort to find "undue influence" in passive speech on apparel is to repeat its fear of a coordinated "barrage of political and campaign messages." RB at 45. Without Section 211B.11(1), it claims, "campaigns and advocacy groups will be able to organize supporters to wear political apparel to the polling place in an effort to win elections, perhaps focusing on peak voting times." *Id.*

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down a law designed to shield voters from last minute "influence" related to campaign advocacy).

at 45-46. It might confuse or intimidate voters, it asserts, if a voter sees "that every other voter [in the polling place] held the opposite point of view," as evidenced by their apparel.[12] *Id.* at 46.

This picture also ignores existing laws that directly regulate behavior in the polling places. If a large group of apparel-wearing individuals ever tried to stand in a polling place to jointly pressure voters, thus crossing the line between passive speech and electioneering, existing regulations prohibiting active campaigning, Minn. Stat. § 211B.11(1) (first sentence), undue influence, *id.* § 211B.07, and loitering, are available to control the activity.

Even if one entertains the dubious assumption that the passive and temporary presence of speech on apparel could assert undue influence on voters, the broad nature of the political apparel ban renders it unreasonable as a tool to address that concern. After all, the statute prohibits or chills a substantial amount of non-advocacy self-expression, like

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[12] The Government also suggests that intimidation might occur if official election workers wore political apparel. RB at 46. MVA acknowledges that Minnesota can bar official polling place workers and observers from wearing partisan apparel as a narrowly tailored means to secure government impartiality—and the appearance of impartiality. However, an all-encompassing ban on political apparel, one sweeping in material referencing the names of organizations, is overbroad even with respect to poll workers and officials who work in absentee ballot locations. Further, the Government has not raised an interest in impartiality to justify the political apparel ban, most likely because the ban predominately regulates voters, not poll workers.

ideological statements ("Make Speech Free Again"),[13] group identifications, partisan material referring to former political personalities ("I Miss Bill"),[14] and statements of personal concern and association ("Basket of Deplorables"),[15] that cannot be reasonably construed as voter pressure.[16] *Talley v. California*, 362 U.S. 60, 64 (1960) (a ban on handbills that failed to disclose the author was not justified by an interest in preventing fraud and libel because it was not limited to items with such traits); *CIO*, 335 U.S. at 146 (Rutledge, J., concurring) (a statute barring unions from spending money on political publications to prevent "undue influence" was too broad).

To minimize the consequences of its unreasonably broad ban on passive political expression, the Government assures the Court that the restriction on free speech operates only for the ten minutes or so

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[13] https://shop.gab.ai/products/hat-make-speech-free-again-coming-soon (last visited Feb. 16, 2018).

[14] *See* http://5newsonline.com/2016/11/07/what-can-you-bring-to-a-polling-place-cellphones-political-t-shirts-children/.

[15] In 2016, a man wearing a shirt stating "Basket of Deplorables" was arrested for refusing to take it off after being ordered to do so at a Texas polling place. https://www.washingtonpost.com/news/morning-mix/wp/2016/10/28/he-wore-a-trump-hat-and-deplorables-shirt-to-vote-texas-police-arrested-him/?utm_term=.069bfa940078.

[16] The law is also unreasonable as a means to address political advocacy in polling places because it is underinclusive. No Minnesota law bars a voter from carrying a voting guide, newspaper, magazine, book, phone, or computer tablet that conveys a potentially "influential" political message into a polling place. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-05 (1979).

people are in polling places. RB at 21. It is, however, a substantial affront to personal autonomy and expression to be told by the Government that one cannot peacefully speak about the government, particularly during an election, whether that restriction lasts ten minutes or ten hours.[17] Moreover, common sense and evidence in the record confirms that people who cannot wear political apparel when actually voting will be deterred from wearing it when going to and from polling places. JA 119, ¶ 27; *id.* at 122, ¶ 9. Finally, the Government's argument ignores the political apparel ban's application to absentee voting locations.

People want to wear apparel communicating personal beliefs at times and places where it matters. JA 109, ¶ 6, 16; *id.* at 41, ¶ 16. The desire and value of expressing one's own political beliefs is naturally heightened in election season, when everyone is discussing political topics. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (The First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office.). Section 211B.11(1) imposes a sweeping and unreasonable suppressant on the use of apparel to peacefully convey political self-expression at a time when its value as speech is at its zenith and its protection is most needed. *Id.*; JA 117 at 24, *id.* at 119, ¶ 27; JA 122, ¶ 9 (affidavits documenting Section 211B.11(1)'s chilling effect on individual self-expression).

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[17] *See* http://www.statesman.com/news/williamson-county-asked-apologize-voter-told-cover-vote-the-bible-shirt/BuA5hwShbbVDjITrFRGF0O/ (a woman forced to remove her "Vote the Bible" shirt when voting in Texas in the 2012 election recounts how the order made her feel "embarrassed, humiliated and intimidated").

D. The Statute Cannot Be Considered Viewpoint Neutral Due to Lack of Constraints on Discretionary Application of the Term "Political"

The Government wrongly contends that Section 211B.11(1) raises no viewpoint discrimination concerns. RB at 54-55 (mistakenly viewing the inquiry into viewpoint discrimination as a superficial one). In addition to considering whether a law discriminates against certain views on its face, the Court considers—even in facial disputes—whether the law may have a discriminatory effect in practice. *See Sorrell*, 564 U.S. at 564 (the "inevitable effect of a statute on its face may render it unconstitutional") (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968))). The danger that a law may be used for viewpoint discrimination is highest when it hinges on standards that are susceptible to shifting and discriminatory application. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n.19 (1993) (because "the distinction between a 'newspaper' and a 'commercial handbill' is by no means clear . . . the responsibility for distinguishing between the two carries with it the potential for invidious discrimination of disfavored subjects"); *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (directing remand as to one portion of a forum access policy because it was "unclear . . . what protection, if any, there is for viewpoint neutrality" given officials' discretion to apply it in a discretionary manner).

These principles apply here. Due to the uncertain reach of "political," and the lack of constraints on expansive and shifting applications of the term to ban disfavored viewpoints, Section 211B.11(1) is not truly

viewpoint neutral. *Discovery Network, Inc.*, 507 U.S. at 423 n.19. The bottom line is that Section 211B.11(1) imposes an expansive, substantial, and potentially discriminatory burden on passive and protected self-expression, free association, and generalized political speech[18] without sufficient justification. It is therefore unconstitutionally overbroad.

III.

THIS CASE IS NOT APPROPRIATE FOR STATE COURT CERTIFICATION

The Government's final request seeks certification of this case to the Minnesota Supreme Court so that the state court may issue a "definitive interpretation" of Section 211B.11(1). RB at 57. This is inappropriate for three reasons. First, this Court will rarely halt proceedings in a case involving a facial First Amendment claim for the purpose of allowing state courts to weigh in because such a delay would itself chill freedom of speech. *Sorrell*, 564 U.S. at 563 (citing *Zwickler v. Koota*, 389 U.S. 241, 252 (1967)); *City of Houston v. Hill*, 482 U.S. 451, 467 (1987) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965)).

Second, even in non-First Amendment cases, certification is proper only when a statute is "readily susceptible" to a narrowing interpretation that might nullify the constitutional dispute. Here, there is no obvious, potentially narrowing construction of Section 211B.11(1) that could do so. The Government

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[18] The Government's attempt to minimize the penalties arising from a violation of its political apparel ban fails to reduce its chilling effect, as "even minor punishments can chill protected speech." *Free Speech Coalition*, 535 U.S. at 244 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)).

certainly has not identified one. *See Harman v. Forssenius*, 380 U.S. 528, 536 (1965). Its only suggestion is that a state court might decide to strike out the portion of Section 211B.11(1) that extends the political apparel ban to absentee ballot stations. RB at 57 n.30. Even if this were possible under state law,[19] it would not negate the constitutional controversy because the question would remain whether the political apparel ban violates the First Amendment as applied to polling places on election days.

Finally, the City has never previously raised the issue of certification or abstention, despite having opportunities to do so twice in the Eighth Circuit and in its Opposition to the Petition for Certiorari. Its "tardy decision to urge abstention is remarkable given its acquiescence for more than [seven] years to federal adjudication of the merits and its insistence before the district court and the panel that the ordinance was both unambiguous and constitutional on its face." *Hill*, 482 U.S. at 467 n.16; Sup. Ct. R. 15.2. The delay undercuts the Government's argument, *id.*; *see also, Mayor of Philadelphia v. Educ. Equality League*, 415 U.S. 605, 628 (1974), and in combination with precedent, confirms this case is appropriately resolved in this forum.

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[19] The Government seems to suggest that the state court might strike the absentee ballot provision on overbreadth grounds. RB at 57 n.30. But this requires application of Constitutional law, not state law. As such, the suggestion is not a proper basis for certification.

CONCLUSION

The Court should declare Section 211B.11(1) facially unconstitutional under the First Amendment and remand the case to the district court with directions to enter judgment for Plaintiffs. *See* 28 U.S.C. § 2106.

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No. 16-1435

In the Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL., PETITIONERS,
v.
JOE MANSKY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union of Minnesota, an affiliate of the national ACLU with more than 32,000 members and supporters, is devoted to civil liberties and civil rights advocacy on behalf of all Minnesotans. This brief refers to *amici* collectively as "the ACLU."

Since its founding in 1920, the ACLU has vigorously defended both free speech and voting rights. Free speech is inextricably linked to protecting voting rights, just as voting rights can be important to enforce protections for speech. Seminal First Amendment cases including *NAACP v. Button*, 371 U.S. 415 (1963), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), have helped protect organizations that work to expand voting rights and other civil rights from government interference. Restrictions on speech have always been a powerful tool to suppress voting rights, and First Amendment protections an important safeguard for activists expanding the franchise.

In furtherance of its interest in defending these important constitutional rights, the ACLU has appeared before this Court in numerous free speech

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae*, their members, or *amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have provided blanket consent to the filing of amicus briefs in this case, and copies of the letters of consent are on file with the Clerk's Office.

cases as both direct counsel and *amicus curiae*. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (direct representation); *Matal v. Tam*, 137 S. Ct. 1744 (2017) (amicus); *Hill v. Colorado*, 530 U.S. 703 (2000) (amicus). Likewise, the ACLU has appeared before the Court as direct counsel in many voting rights cases, including *Husted v. A. Philip Randolph Institute* in the current Term. *See also Shelby Cty. v. Holder*, 570 U.S. 529 (2013). And it has appeared as an amicus in a series of voting rights cases, including *Gill v. Whitford* in the current Term. *See also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

The ACLU has filed legal challenges against strict voter identification requirements. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017). It opposes voter identification laws that suppress the right to vote. Thus, it does not support the cause for which some of the speakers challenging Minnesota's law advocate. It nonetheless supports their right to express those views, and opposes overbroad laws that suppress political speech, regardless of whether the ACLU approves or opposes the views expressed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Political speech lies at the core of the First Amendment's protection. It is essential to our representative democracy that citizens be able to communicate about matters of governance. This Court has therefore always subjected laws that prevent in-

dividuals from communicating about politics to the most exacting constitutional scrutiny.

The right to vote is also essential to our democracy. The government therefore has significant latitude to enact *narrowly* tailored restrictions on particular forms of speech at the polling place that pose a risk of direct intimidation and harassment, and thereby threaten the integrity of the franchise. Many states have enacted anti-electioneering statutes, which forbid direct advocacy at the polling place for a candidate or ballot initiative. But those statutes notably do not bar more general expression about political or social concerns.

Minnesota, along with a handful of other states, has gone much further, by broadly prohibiting voters from engaging in any form of "political" expression at the polling place on election day. Such content-based attempts to create a "politics-free zone" at the polling place are subject to strict scrutiny and fail that test. These laws are far broader than necessary to address the state's compelling interest in protecting the right to vote. The American electorate is surely hardy enough to vote their conscience even if they notice their fellow citizens wearing, say, a Black Lives Matter or AFL-CIO t-shirt, a Women's March hat, or a pro-life or peace-sign button.

Minnesota's law against political speech is also hopelessly and fatally vague. It bestows massive, unchecked discretion on election judges and poll workers to decide on the spot what is and is not "political," forcing voters into a Hobson's choice between two constitutional rights: voting or speaking. This Court should reverse.

ARGUMENT

THE MINNESOTA STATUTE VIOLATES THE FIRST AMENDMENT

A. The Minnesota Statute Is a Content-Based Restriction on Core Political Speech Subject to Exacting Scrutiny.

The protection of political speech is at the core of this Court's First Amendment jurisprudence. Above all else, the First Amendment safeguards the ability to debate issues pertinent to our nation's governance. "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Burson v. Freeman*, 504 U.S. 191, 196 (1992); *accord, e.g.*, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375–76 (1984); *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (per curiam).

Because core political speech is "fundamental to our constitutional system," exacting scrutiny applies to government restrictions on such speech. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 666 (1990), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Restrictions on speech based on its political content must be "narrowly tailored" to serve a "compelling governmental interest." *Id.*; *see also, e.g.*, *Burson*, 504 U.S. 198; *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Speiser v. Randall*, 357 U.S. 513, 529 (1958). The narrow-tailoring prong requires that "a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest." *Burson*, 504 U.S. at 199. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v.*

Playboy Entm't Group, 529 U.S. 803, 813 (2000). Few content-based restrictions are so essential as to be "necessary to serve the asserted [compelling] interest." *Burson*, 504 U.S. at 199. As a consequence, this Court has "readily acknowledge[d] that a law rarely survives such scrutiny." *Id.* at 200.

Where a sovereign seeks to regulate core political speech—indeed, where it imposes any content-based restrictions on speech—its regulation will be subject to strict scrutiny. The test for the regulation of core political speech, and for most content-based restrictions, remains largely unchanged over decades of jurisprudence. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011); *Citizens United*, 558 U.S. at 339–40.

Minnesota's polling-place speech restriction is content-based because it proscribes speech expressly because of its "political" content. Furthermore, it specifically identifies content that lies at the core of the First Amendment: political expression. The statute is not limited to advocacy of a particular candidate or issue on the ballot on that election day. Rather, the statute broadly calls for election judges to stop individuals from wearing apparel with "political badges," "political buttons," or "political insignia" in polling places. Minn. Stat. § 211B.11. As Minnesota interprets the statute, the word "political" includes any message considered to be "[i]ssue oriented material designed to influence or impact voting" or "[m]aterial promoting a group with recognizable political views." Pet. App. I-2. Minnesota thus construes the statute, for example, to bar "Please ID Me" designs, regardless of whether any voter identification issue is on the ballot. *See id.* Such messages bear on some of the most hotly contested issues in our society. By its plain language, the statute targets protect-

ed expression based on its political content while leaving non-political expression untouched. Therefore, the law is subject to strict scrutiny.

The court below bypassed the exacting standards of strict scrutiny by labeling a polling place a non-public forum, where regulations on speech face less searching review. Pet. App. A-5. But forum analysis is not useful for this case because individuals going to vote do not seek access to government property as a platform to engage in private speech. Rather, a polling place exists for voting; the challengers here simply want to express themselves in a non-disruptive manner while exercising their constitutional right to vote, in the only place where they are permitted to do so. A prohibition on doing so does not trigger forum analysis. Thus, this Court did not consider forum analysis necessary in *Cohen v. California*, 403 U.S. 15 (1971). Cohen's conviction for wearing a jacket proclaiming an anti-war message in a courthouse was deemed invalid because it prohibited speech based on its content, regardless of whether the courthouse might be considered a public or non-public forum.

Regardless, the Minnesota statute is unconstitutional under any standard. The flaws that doom the statute under strict scrutiny also render the statute unreasonable, viewpoint-discriminatory, and therefore unconstitutional even if viewed as a restriction on speech in a non-public forum. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The government has an interest in ensuring that voters attempting to exercise their constitutional rights at the polling place are not subject to coercion or intimidation. *See infra*, Part B. But the government lacks any valid interest, much less a reasonable or compelling one, in cleansing the polling place of all political expression. The blanket ban on

political expression here is "facially unconstitutional . . . regardless of the proper standard." *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987). Prohibiting passive displays of political opinions goes far beyond what is reasonable to protect other voters from coercion or intimidation.

Nor does the fact that the Minnesota statute regulates political messages in the form of words, symbols, or pictures on apparel rather than spoken communication weaken the First Amendment's protection. The First Amendment fully protects individuals' rights to express their political views through clothing. *See, e.g., id.* at 576; *Cohen*, 403 U.S. at 18; *Tinker*, 393 U.S. at 508, 514; *Picray v. Sec'y of State*, 916 P.2d 324, 329 n.12 (Or. Ct. App. 1996) (describing the long historical pedigree of political clothing and paraphernalia). As discussed below, the state's interest in regulating expression through words, symbols, or pictures on clothing is, if anything, *less* substantial because such passive, "nondisruptive" displays pose no risk of the sort of intimidation or harassment that may justify limited restrictions on other forms of speech. *Jews for Jesus*, 482 U.S. at 576.

B. States Have a Compelling Interest in Preventing Coercion and Voter Intimidation at Polling Places on Election Day.

While content-based restrictions on political speech are subject to strict scrutiny, states still have considerable leeway to adopt limited and narrowly tailored restrictions on speech at the polling place on election day.

States have a compelling interest in preserving the integrity of the election process by preventing intimidation and fraud at polling places. *See Burson*,

504 U.S. at 199. This interest is compelling because "the 'right to vote freely for the candidate of one's choice is of the essence of a democratic society.'" *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). "[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Id.* (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

This compelling interest includes protecting the rights of citizens to vote freely for the candidates of their choice without being coerced or subjected to intimidating influences while they are at the polling place. *See id.* at 200–06 (examining the history of election regulation and concluding that it "reveals a persistent battle against two evils: voter intimidation and election fraud"). "The Court thus has upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Id.* at 199.

For these reasons, the polling place on election day is one of the "rar[e]" contexts where certain content-based restrictions on speech may pass muster. *Id.* at 200. But this does not give states license to write all-encompassing laws that silence or punish more speech than necessary. After all, any content-based law that restrains polling-place speech must be "necessary to serve the asserted interest." *Id.* at 199. No matter the strength of the state interest asserted, a law that sweeps more broadly than necessary in its curtailment of core political speech cannot stand in our Republic.

C. Narrowly Tailored Prohibitions on Direct Electioneering at the Polling Place Protect the Compelling State Interest in Voting, Without Infringing the Right to Free Speech.

Most states have effectively protected the right to vote without intimidation, coercion, and harassment through laws that restrict only the specific forms of speech that actually give rise to those concerns: advocacy of a particular candidate or issue on the ballot on that election day, often referred to as "electioneering." *See, e.g.*, *Electioneer*, Merriam-Webster English Dictionary, https://goo.gl/GW71mC (last visited Jan. 12, 2018) (defining "electioneer" as "to take an active part in an election; specifically: to work for the election of a candidate or party"); *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 74, 75 (1988) (characterizing prohibition on churches from "participat[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office" as an "anti-electioneering provision"). It is this type of statute that this Court upheld under strict scrutiny in *Burson*.

The Tennessee statute at issue in *Burson* prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position . . . ." *Burson*, 504 U.S. at 193–94. Statutes appropriately tailored in this way do not violate the First Amendment because "some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Id.* at 206.

Most states have adopted tailored anti-electioneering laws similar to the law upheld in *Bur-*

son. For example, California's election code prohibits electioneering, which is defined as "the visible display or audible dissemination of information that advocates for or against any candidate or measure on the ballot," within 100 feet of a polling place. Cal. Elec. Code. § 18370(d); *id.* § 319.5. Similarly, Colorado's election code defines electioneering to include "campaigning for or against any candidate who is on the ballot or any ballot issue or ballot question that is on the ballot," Colo. Rev. Stat. § 1-13-714(1), and Kentucky's statute prohibits "the solicitation of votes for or against any bona fide candidate or ballot question" in a manner that "expressly advocates" a particular outcome, Ky. Rev. Stat. Ann. § 117.235(3)(c). Most other states that restrict electioneering at or around the polling place define it in a similar, narrowly tailored fashion. *See* Alaska Stat. § 15.56.016(a); Conn. Gen. Stat. § 9-236(a); Ga. Code Ann. § 21-2-414(a); Ky. Rev. Stat. Ann. § 117.235(3); Me. Rev. Stat. Ann. tit. 21-A, § 682; Miss. Code Ann. § 23-17-55; Mont. Code Ann. § 13-35-211; N.H. Rev. Stat. Ann. § 659:43; R.I. Gen. Laws § 17-19-49; Or. Rev. Stat. § 260.695; Tex. Elec. Code Ann. § 61.010(a); Utah Code Ann. § 20A-3-501; Va. Code Ann. § 24.2-604; Wash. Rev. Code § 29A.84.510; Wis. Stat. § 12-03(2).[2]

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[2] In addition, some states prohibit "electioneering" without defining the term, but there is no reason to think these states would construe the term, in the face of the canon of constitutional avoidance, as covering more speech than its customary and accepted meaning. *See* Ark. Code Ann. § 7-1-103(a)(9); D.C. Code § 1-1001.10(b)(1)(2)(A); Idaho Code § 18-2318(1); 10 Ill. Comp. Stat. § 5/7-41(c); Iowa Code § 39A.4(1); Md. El. Ann. Code § 16-206(a); Mo. Rev. Stat. § 115.637(18); Neb. Rev. Stat. § 32-1524; N.M. Stat. Ann. § 3-8-77; N.Y. Elec. Law § 8-

Tailored restrictions on electioneering at the polling place advance the compelling interest in maintaining electoral integrity without prohibiting more speech than necessary. However, a state may not, consistent with the First Amendment, seek to silence or punish *all* political speech in the name of preventing fraud or undue influence, as the Minnesota statute seeks to do.

D. The Minnesota Statute Is Overbroad and Unreasonable.

The Minnesota statute violates the First Amendment. States may forbid electioneering activity in order to prevent voter intimidation and fraud. But the prohibitions of the Minnesota statute far exceed what is necessary or reasonable to serve those interests. The government may be able to create a "campaign-free zone" at the polling place, *Burson*, 504 U.S. at 193, but it cannot create a "politics-free zone."

1. The Statute Unnecessarily Penalizes Vast Amounts of Protected Speech.

Rather than merely regulating speech that aims at disruption, active solicitation, or engagement of other voters on ballot issues or candidates, Minnesota has banned an entire category of expression, targeting any passive display of "political badges, political buttons, or other political insignia." Minn. Stat.

104(1); Okla. Stat. tit. 26 § 7-108. Other states define "electioneering" only slightly more broadly, to include expressing support for or opposition to a candidate, ballot question, or *political party* on the ballot. *See, e.g.*, Ariz. Rev. Stat. § 16-411(H); Ind. Code Ann. § 3-14-3-16(b); Kan. Stat. Ann. § 25-2430(a); Nev. Rev. Stat. § 293.361; 25 Pa. Cons. Stat. § 3060.

§ 211B.11. The First Amendment does not tolerate this heavy-handed approach. *See Jews for Jesus*, 482 U.S. at 575–76 (finding unconstitutional a resolution purporting to create a "First Amendment Free Zone" at Los Angeles International Airport); *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994) (striking down law banning most residential signs).

The Minnesota statute's overbreadth is all the more harmful because it targets a form of political speech—wearing or displaying political or "issue oriented" clothing or symbols—that is by its very nature "non-disruptive" and non-obtrusive. *Jews for Jesus*, 482 U.S. at 576; *cf. Burson*, 504 U.S. at 200–04 (explaining that anti-electioneering grew out of historical experience in which voters approaching the polls had to walk a gauntlet of peddlers and cajolers).

Unfortunately, Minnesota is not alone in attempting to regulate polling-place expression more extensively than the First Amendment and this Court's precedents permit. While most states draw the line at electioneering, *see supra* Part C, a few states follow Minnesota in imposing a sweeping ban on "political" expression. *See, e.g.*, Del. Code Ann. tit. 15, § 4942 (banning "political discussion of issues, candidates or partisan topics, the wearing of any button, banner or other object referring to issues, candidates or partisan topics"); N.D. Cent. Code § 16.1-10-03 (providing that no "political badge, button, or insignia may be worn within that same area while a polling place is open for voting"); Vt. Stat. Ann. tit. 17, § 2508(a) (providing that "no campaign literature, stickers, buttons, name stamps, information on write-in candidates, or other political materials are displayed, placed, handed out, or allowed to remain").

The Minnesota statute and others like it stray far beyond the limited latitude that states have under *Burson* to regulate in this area. A state's legitimate interest in "preventing voter intimidation and election fraud," *Burson*, 504 U.S. at 206, cannot justify blanket suppression of all expression at the polling place that may be deemed to relate in some way to politics or political issues, regardless of whether it is tied to any issue or individual on the ballot. Just as the restriction invalidated in *Jews for Jesus* went far beyond "regulat[ing] expressive activity . . . that might create problems such as congestion or the disruption of the activities of those who use LAX," 482 U.S. at 574, the Minnesota statute goes far beyond regulating speech that could coerce or intimidate voters or undermine the integrity of the election. "The silent expression of political opinion is not coercive." *Picray*, 916 P.2d at 329. Minnesota need not fear that Americans exercising their right to vote will be chilled by seeing that a neighbor has chosen to sport an Occupy Wall Street ball cap or a Moral Majority lapel button.

2. The Statute Confers Unchecked Enforcement Discretion and Invites Viewpoint Discrimination.

The Minnesota statute is particularly pernicious because it confers unbridled discretion on poll workers, inviting arbitrary enforcement and leading to inevitable viewpoint discrimination. The Election Day Policy specifically states that "[e]lection judges have the authority to decide what is 'political.'" Pet. App. I-1. This delegation of authority, combined with the breadth and vagueness of the terms "political" and "issue oriented," grants sweeping and final discretion to poll workers whose own viewpoints will inevitably

influence what they see as "political" or not. A phrase that one person may consider to be innocuous or non-political—like "#MeToo"—may appear to another to be an overtly political statement. The same goes for someone wearing a Colin Kaepernick jersey or t-shirts depicting pictures of Andrew Jackson, Bob Dylan, Beyoncé, or the official seal of the U.S. Chamber of Commerce.

Notably, poll workers are not typically veteran government employees with extensive training in the First Amendment. Minnesota invites its private citizens to become "temporary" poll workers for a day. *See* Office of the Minnesota Sec'y of State Steve Simon, *Become an Election Judge*, https://goo.gl/E2bKmH (last visited Jan. 12, 2018). Even "16 and 17-year-old students can work as election judge trainees" and "will be assigned the same duties as other judges, with the exception of tasks requiring party affiliation." *Id.* Yet Minnesota deputizes such temporary non-specialists with the immense responsibility of determining what messages conveyed by their fellow citizens' clothing are impermissibly "political." Pet. App. I-1.

A law that, in regulating expressive activity, "confers on police a virtually unrestrained power to arrest and charge persons with a violation . . . is unconstitutional because the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Jews for Jesus*, 482 U.S. at 576 (alteration in original). Such laws open the door to selective enforcement based on the content of the speech. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 465 & n.15 (1987). This Court has "repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for

words or conduct that annoy or offend them." *Id.* (citing numerous cases).

The dangers of excessive discretion are all the more acute here, where selective enforcement invites invidious viewpoint discrimination. "A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). For this reason, "viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints." *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cty. Pub. Schs.*, 457 F.3d 376 (4th Cir. 2006) (citing *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304–05 (2000)).

Neither the Minnesota statute's text nor the state's Election Day Policy contains safeguards against selective enforcement. The state attempts to create a façade of neutrality by drawing from both ends of the political spectrum when giving examples of prohibited expression. *See* Pet. App. I-2 (listing "the Tea Party, MoveOn.org, and so on"). But isolated examples cannot substitute for proper tailoring of speech regulations in the first instance. Poll workers are human beings with their own political views and perspectives. Even the most well-intentioned poll workers cannot be expected to put their perspective entirely aside merely because they are advised that the restriction covers messages from both ends of the political spectrum.

The Minnesota statute and the Election Day Policy create the risk that unpopular or unorthodox

opinions or beliefs will be deemed "political" and unfairly excluded from the polling place. As the Court has warned on multiple occasions, imprecise, standardless statutory language "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972). Such language is "an obvious invitation to discriminatory enforcement against those whose . . . ideas, . . . lifestyle, or . . . physical appearance [are] resented by the majority of their fellow citizens." *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971); *accord Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("imprecise" regulation of speech raises specter of "discriminatory enforcement"). The risk of content and viewpoint discrimination is "at its zenith" when, as here, "the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988).

3. The Statute Is Impermissibly Vague.

The Minnesota statute's imprecise language not only heightens the threat it poses to voters' First Amendment rights; it also raises serious due process concerns. The statute both "authorizes or even encourages arbitrary and discriminatory enforcement" and "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill*, 530 U.S. at 732. In the First Amendment context, this Court has shown particular concern for the potential chilling effects of vague legal prohibitions. This Court has struck down statutes that are so vague as to create confusion or uncertainty for the average person. *See Reno*, 521 U.S. at 871

(holding vagueness of words "indecent" and "patently offensive" will create uncertainty among speakers).

At a time of heated political debate on many fronts in our society, it is inconceivable that a voter could be expected to discern from the Minnesota statute or the Election Day Policy whether a particular message on his or her clothing is banned (or might be selectively banned by a poll worker). Minnesota treats the violation of Section 211B.11 as a petty misdemeanor carrying a fine of up to $300. *See* Minn. Stat. §§ 609.02, 609.03. Violations may also be subject to civil penalties. *See* Minn. Stat. §§ 211B.32, 211B.35. Some voters who have unwittingly chosen apparel that runs afoul of the Election Day Policy may elect not to cast a ballot rather than enter a polling place and risk these sanctions.

4. The Statute Forces Voters to Choose Between Two Constitutional Rights.

Minnesota's statute forces voters into a Hobson's choice: they must sacrifice their First Amendment right to free expression in order to secure their constitutional right to vote. Voters who know or fear their expressive apparel will be swept up in Minnesota's ban may opt not to wear it to ensure they are able to vote on election day—leaving their freedom of speech at the door. In other cases, voters who neglect to leave their expressive apparel at home may not be able to exercise the right to vote. While it is Minnesota's policy to allow voters who wear banned apparel to cast their ballot (and be fined later for their choice of Election Day dress), Petitioners' complaint alleged at least one instance of a voter who was unable to vote, suggesting poll workers do not reliably obey this policy. J.A. 78. Moreover, because the statute provides for a future (and significant) fine, it is also

likely that voters who inadvertently violated the policy on Election Day will leave their polling place without casting a ballot rather than risk being punished.

Forcing a citizen to choose between her fundamental rights to speak or vote is impermissible. This Court has long found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968); *see also Garrity v. New Jersey*, 385 U.S. 493, 497 (1967); *Green v. United States*, 355 U.S. 184, 191–92 (1957). Nowhere is this principle more sacrosanct than in the First Amendment context. *See Lefkowitz v. Cunningham*, 431 U.S. 801 (1997) (holding it improper to force choice between invoking Fifth Amendment right against self-incrimination and First Amendment associational right to hold public office); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (improper to force choice between freedom to travel and freedom of association). Our Constitution protects both freedom of speech and the right to vote. Minnesota's law forcing a choice between the two should be invalidated.

CONCLUSION

The decision below should be reversed.

Respectfully Submitted,

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No. 16-1435

IN THE

Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, *et al.*,
Petitioners,

v.

JOE MANSKY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AND ASSOCIATION FOR GOVERNMENT ACCOUNTABILITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is Minnesota Statute Section 211B.11, which broadly bans all political apparel at the polling place, facially overbroad under the First Amendment?

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan 501(c)(3) nonprofit public-policy organization dedicated to protecting constitutional liberty. The ACRU Policy Board sets the policy priorities of the organization, and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel, William Bradford Reynolds, the former Assistant Attorney General for the Civil Rights Division; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU has participated as *amicus curiae* in numerous free speech cases in the context of elections, including *Citizens United v. FEC*, 558 U.S. 310 (2010). The ACRU also litigates election law cases nationwide.

The Association for Government Accountability ("AGA") is a statewide Minnesota association of citizens and taxpayers concerned about the accountability of government under the law. AGA seeks to promote the rule of law and does so by, among other things, filing and participating in lawsuits involving the government where it has strayed from the rule of law. In this

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[1] No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37. All parties consented to the filing of this brief.

regard, AGA sponsored litigation that resulted in an injunction that blocked a Minnesota county's illegally authorized safe driving classes, and it filed a mandamus petition in Minnesota state court seeking to compel the State to pay legislators their constitutionally authorized salaries notwithstanding the Governor's line-item veto of the appropriation.

SUMMARY OF ARGUMENT

"Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life*, 551 U.S. 449, 474 (2007) (opinion of Roberts, C.J.).

Here, the Eighth Circuit erroneously let Minnesota and the local-government Respondents (collectively "Minnesota") play the censor. Minnesota did not like what some members of the Minnesota Voters Alliance were wearing when they went to the polls because the clothing and accessories were political. Neither the clothing nor the accessories encouraged other voters to vote for or against a particular candidate. Instead, it just raised issues the wearers thought important.

The Eighth Circuit relied on this Court's fractured decision in *Burson v. Freeman*, 504 U.S. 191 (1992). There, this Court upheld a ban on campaign-related activity in and near polling places at election time. No rationale generated a majority, which begs the question: What deference should this Court give to such a decision that does not generate a majority rationale? The answer is none; this Court writes on a blank slate, giving respect to the persuasive power of all opinions in the majority and due concern for the

points raised in dissent. Stare decisis does not protect *Burson*, and even the statute upheld in *Burson* might not survive under the Court's modern free-speech jurisprudence. The Court should clarify *Marks v. United States*, 430 U.S. 188 (1977), and hold that this Court regards no opinion in *Burson* as precedent.

Minnesota Voters Alliance should prevail, no matter how that important doctrinal point is resolved. Minnesota wishes to suppress all manner of political speech. Even if *Burson* is good law, it applies only to campaign-related activity, not to the infinitely elastic term "political," and thus does not control here.

But even if *Burson* were to control here, the statute would still fail. Under the *Burson* plurality, this statute fails strict scrutiny for two reasons: First, because Minnesota fails to explain how a categorical ban on political thought is narrowly tailored. Second, even if it offered an explanation, Minnesota failed to support its premise by a "strong basis in evidence."

ARGUMENT

I. This case differs from *Burson* in significant ways.

In rejecting Petitioners' facial challenge to the Minnesota law and the related policy, the U.S. Court of Appeals for the Eighth Circuit relied on *Burson v. Freeman*, 504 U.S. 191 (1992). The appellate court reasoned that *Burson* "defeats a facial attack" on the Minnesota law insofar as it spoke to areas outside the polling place. App. D-7. The court also explained, "Because a statute restricting speech related to a political campaign outside the polling place survives strict scrutiny [under *Burson*], the Minnesota statute,

to the extent it restricts speech about a political campaign inside a polling place, is 'reasonable in light of the purpose which the forum at issue serves.'" *Id.* at D-9 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). Accordingly, the Eighth Circuit's reading of *Burson* controlled its analysis.

In *Burson*, this Court rejected a challenge to a Tennessee law that prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" in polling places or within 100 feet of their entrances. Tenn. Code Ann. § 2-7-111(b) (Supp. 1991). The treasurer of a candidate for city council in Metropolitan Nashville-Davidson County complained that, on its face, the Tennessee law's restriction of her ability to communicate with voters violated, among other things, the First and Fourteenth Amendments to the United States Constitution.

The Court rejected that claim. It reversed the decision of the Tennessee Supreme Court, which had upheld the law as it applied to polling places, but not as to the 100-foot bubble around them. Significantly, that bubble "sometimes encompasse[d] streets and sidewalks adjacent to the polling places." *Burson*, 504 U.S. at 196 n.2 (plurality opinion); *see also id.* at 214 (Scalia, J., concurring in the judgment).

Justice Blackmun's opinion for the four-Justice plurality recognized that the Tennessee law "implicate[d]" political speech in a public forum based on its content. *Id.* at 196 (plurality opinion). The speech impacted by the statute was limited to "speech related

to a political campaign." *Id.* at 197. Even so, the law was a "facially content-based restriction on political speech in a public forum." *Id.* at 198. Accordingly, the plurality applied what it called "exacting scrutiny," requiring the State to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

Tennessee asserted two interests that the plurality found compelling. First, it argued that the law protected "the right of its citizens to vote freely for the candidates of their choice." *Id.* at 198. Second, Tennessee contended that its law vindicated its interest in protecting the integrity of the electoral process. As the plurality noted, the Court "has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id.* at 199.

The plurality explained that the "history of election regulation" showed that the States were engaged in a "persistent battle against two evils: voter intimidation and election fraud." *Id.* at 206. Those evils were addressed by "a secret ballot secured in part by a restricted zone around the voting compartment." *Id.* Significantly, that restricted zone was a response to "ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud." *Id.* at 207; *cf. Russell v Lundergan-Grimes*, 784 F.3d 1036, 1051 (6th Cir. 2015) (reasoning that in *Burson*, the Court "sought to protect free speech on the one hand, while preventing speech from being used as a means to effectuate fraud or intimidation").

The plurality held that the Tennessee ban on campaign speech in and near polling places survived some form of strict scrutiny. It concluded that Freeman's First Amendment rights had to yield to the "right to cast a ballot in an election free from the taint of intimidation and fraud." *Id.* at 211.[2] That said, the plurality recognized that its ruling in favor of such a speech restriction was "a rare case." *Id.*

Justice Stevens wrote the dissent for three Justices, noting that Tennessee's law "raise[d] constitutional concerns of the first magnitude." *Id.* at 217 (Stevens, J., dissenting) He explained that the law "directly regulates political expression," "targets only a specific subject matter (campaign speech) and a defined class of speakers (campaign workers)," and "somewhat perversely disfavors speech that normally is accorded greater protection than the kinds of speech that the statute does not regulate." *Id.* Accordingly, Tennessee had to show the necessity and narrow tailoring of its regulation.

Justice Stevens argued that Tennessee had failed to make the necessary showing. In particular, he criticized the plurality's application of "exacting"

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[2] Justice Kennedy separately concurred, reasoning that the balancing of constitutional interests can be reconciled with the general bar on restricting speech based on its content. *Burson*, 504 U.S. at 213–14 (Kennedy, J., concurring). Justice Scalia concurred in the judgment only. He reasoned that, because "the portions of streets and sidewalks adjacent to polling places are not public forums *at all times*, *Burson*, 504 U.S. at 261 (Scalia, J., concurring in the judgment) (emphasis in original), any limitations on speech in those locations need only be reasonable and viewpoint-neutral to be constitutional.

scrutiny. As Justice Stevens noted, the plurality "decline[d] to take a hard look at whether the state law is in fact 'necessary.'" *Id.* at 225. In addition, the plurality "lighten[ed] the State's burden of proof in showing that a restriction on speech is 'narrowly tailored.'" *Id.* at 226. The plurality also "effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff." *Id.* The result of the plurality's solicitude for the State was to make its scrutiny "neither exacting nor scrutiny." *Id.*

The dissenters asserted that Tennessee failed to satisfy its burden of "demonstrating that its silencing of political expression is necessary and narrowly tailored to serve a compelling state interest." *Id.* at 217 (Stevens, J., dissenting). Justice Stevens observed that the "campaign-free zone" was notable for its "broad antiseptic sweep." *Id.* at 218. In addition, the Tennessee law's wide reach entailed a ban on "[b]umper stickers on parked cars and lapel buttons on pedestrians." *Id.* at 219. "The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd." *Id.*

Burson's plurality opinion may be correct to the extent that it applies to campaign activities. Nonetheless, it is sufficiently *sui generis* that it should not be extended to cover the elastically defined and applied "political." Indeed, Judge Shepherd, who concurred in part and dissented in part below, did not "agree that *Burson* may be applied to this statute to uphold the restrictions on the wearing of any political insignia in the polling place." App. D-16 (Shepherd, J., concurring in part and dissenting in part). Moreover,

this Court in *Packingham* rejected North Carolina's attempt to use *Burson* as an "analogy" for a wide ranging limitation on speech. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

The Eighth Circuit's decision here is incorrect under any of the opinions that together formed a majority in *Burson*. Even if polling places are nonpublic fora, as Justice Scalia believed, *Burson*, 504 U.S. at 214–16 (Scalia, J., concurring in the judgment), that does not save the statute, because speech restrictions in a nonpublic forum still must be viewpoint-neutral and "reasonable in light of the purpose served by the forum." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (internal quotation marks omitted). Minnesota's ban on apparel displaying a political message and small lapel buttons supporting election-integrity measures such as voter-ID laws does nothing to prevent election fraud or voter intimidation. It is thus unreasonable in light of the polling location's purpose.

II. This Court should clarify *Marks* and hold that stare decisis does not counsel treating *Burson* as precedent.

Stare decisis is typically on the table when the Court is debating whether to overrule precedent. However, when considering cases in which *Marks* was followed, it is also relevant when the Court is determining whether to follow a cited case as one that must be reconciled with the Court's reasoning in one or more subsequent cases. Several principles the Court considers when deciding whether to overrule a precedent are implicated when the Court determines how much weight to afford a prior case.

The Court of Appeals below rightly determined that, if *Burson* controlled this case, that lower court was bound by *Marks*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (internal quotation marks omitted). *Marks* requires lower courts to treat the words of whichever opinion of a fractured Supreme Court decision delivers the deciding vote as if it were a majority opinion. That rule of decision governs inferior courts, but does not apply in this Court.

Instead, when this Court reviews a judgment wherein *Marks* dictated the analytical method of the lower court, this Court should treat the question as one of first impression beyond the actual judgment in the earlier case if the case finally arrives here. Stare decisis may afford some measure of protection for the prior judgment, but does not protect any opinion in that prior decision.

Stare decisis is a judicial policy "of fundamental importance to the rule of law." *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). It "avoids the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.). These features are central to the rule of law, such that this Court "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Stare decisis therefore counsels the Court to adhere to precedent "unless the most convincing of reasons

demonstrates that adherence to it puts [this Court] on a course that is sure error." *Citizens United v. FEC*, 558 U.S. 310, 362 (2010). Indeed, Chief Justice Roberts's explanation that the decisional process informing the Court's determination in *Citizens United* that stare decisis does not protect errant First Amendment precedents from being overruled also counsels against invoking stare decisis where *Burson* is concerned. *See id.* at 376–85 (Roberts, C.J., concurring).

"Under this judicial policy, a federal court will generally adhere to the conclusion and central reasoning of a previous case presenting the same legal question." Curt A. Levey & Kenneth A. Klukowski, *Take Care, Now: Stare Decisis and the President's Duty to Defend Acts of Congress*, 37 Harv. J.L. & Pub. Pol'y 377, 396 (2014). But when *Marks* is in play, it means there is a previous judgment, but no previous majority rationale that was essential to reaching the judgment. Even if the Court adheres to the prior judgment, the Court should give each of the decisions from the prior decision whatever persuasive value the Court deems each to have, without regarding any as a precedent to be followed. *See generally id.* at 393–406.

The principles undergirding stare decisis are inapposite to *Burson* here. One is that "only by following the reasoning of previous decisions can the courts provide guidance for the future, rather than a series of unconnected outcomes in particular cases." Daniel A. Farber, Essay, *The Rule of Law and the Law of Precedents*, 90 Minn. L. Rev. 1173, 1179 (2006). Here, there is no reasoning from the previous decision beyond bare agreement that some speech can be restricted within some modest distance of a polling

location on Election Day to prevent fraud and intimidation. Because the Justices' reasons for that narrow assertion differ from one another, it does not justify an expansive ban on passive political thought. Invalidating the Minnesota statute as overbroad does not disturb *Burson*, and *Burson*'s tension with later cases means that reducing *Burson*'s weight would help minimize the impact this "rare" case has on the law.

Another principle is "the evenhanded, predictable, and consistent development of legal principles." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). As discussed elsewhere in this brief, aspects of *Burson*'s plurality opinion are in tension with the Court's more recent cases pertaining to strict scrutiny; and also to modern free speech jurisprudence. Treating *Burson*'s plurality as a majority holding could undermine the development of relevant legal principles, not help them move along a predictable and consistent course.

Other "relevant factors" are "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009). *Burson* was decided 26 years ago. That is not a recent decision, but also not one shrouded in the mists of time like those forming many English common-law rules. Respondents make no argument that anyone actually relies upon *Burson*. No voter signed an affidavit swearing that he entered the polling location only because he is confident that he knew no one would ask for his vote, to say nothing of being confident that he would not catch a glimpse of a Tea Party T-shirt or an NRA hat. And the Court had no reasoning in *Burson*. Justice Blackmun reasoned, Justice Scalia reasoned, and three

Justices picked between them, but the Court agreed on no reasoning, only a judgment.

Moreover, "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Id.* at 792. No one is asking the Court to overrule *Burson*. But expanding *Burson*'s rationale to the facts of this case would create a hypersensitive voting environment where the Court paternalistically shields more delicate citizens from passive logos they might disagree with. Such a move makes a mockery of the sort of bold citizenship required on Election Day for an advanced democracy. This Court should not facilitate the growth of that sort of environment, and expanding the *Burson* plurality's rationale to that extent would create such an unworkable rule that some frustrated litigants might begin to question *Burson*. Better to leave *Burson* where the Court finds it today, and not expand it to the breadth required to salvage Minnesota's statute.

III. The Minnesota law, like Tennessee's, targets speech based on its content and must satisfy strict scrutiny to be constitutional.

Under the First Amendment, content-based laws, "those that target speech based on its communicative content," are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). To be upheld, those laws must satisfy strict—not "exacting"—scrutiny.

Minnesota's law is plainly content-based. It covers "speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Minnesota doesn't

want to hear pleas for voter-ID or look at clothing bearing the words "AFL-CIO" or "NRA" much less some bearing the Gadsden flag. That clothing is involved does not undercut the fact that the message is at issue. *See Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (The wearing of a black arm band "was closely akin to 'pure speech' which, as we have repeatedly held, is entitled to comprehensive protection under the First Amendment."). To the contrary, the fact that the offending medium is apparel showcases how passive the speech is, and thus how strained is the claim that the clothing could somehow be a pernicious threat that intimidates voters or defrauds the election process.

"[P]resumptively unconstitutional" content-based limitations on speech must be narrowly tailored to serve a compelling state interest. The *Burson* plurality pointed to that standard, but called it "exacting." *See Burson*, 504 U.S. at 198. Its execution of that standard of review was less than rigorous.

Even though the plurality said that it was employing "exacting" scrutiny, it did not require the State to do much more than point to history. The State did not have to rely on other criminal statutes or demonstrate the need for the restrictions. Likewise, it did not have to regulate all speech, just some that it disfavored. *See Burson*, 504 U.S. at 206–08. As Justice Stevens observed, that scrutiny "appear[ed] by the end of [the plurality's] analysis to be neither exacting nor scrutiny." *Id.* at 226 (Stevens, J., dissenting).

In contrast, "[w]hen applying strict scrutiny outside the context of conducting elections, courts generally require a 'strong basis in evidence'" from a State

seeking to carry its burden under that demanding test. *Russell*, 784 F.3d at 1051 (citing *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2423 (2013) (Thomas, J., concurring)). But "*Burson*'s solicitude for state sovereignty regarding elections mitigates [the requisite] evidentiary burden," *id.*, in several ways, as set forth above. Indeed, while the *Burson* plurality recognized that the State "must demonstrate that its law is necessary to serve the asserted interest", it deemed that showing satisfied by "an examination of the evolution of election reform." *Id.* at 199–200.

With respect to the buffer zone outside polling places, the *Burson* plurality did not "require[e] proof that [a particular buffer zone] is *perfectly* tailored," *Burson*, 504 U.S. at 209 (plurality) (emphasis added). Nonetheless, the State's mitigated burden is still a burden: the State must still provide "evidence demonstrating that the strictures of the law are 'reasonable' and do not 'significantly impinge on First Amendment rights.'" *Russell*, 784 F.3d at 1053 (quoting *Burson*, 504 U.S. at 209).

Before *Burson* is extended to cover the full range of political thought, this Court should require more from Minnesota than the *Burson* plurality did from Tennessee. Put simply, the Minnesota law should be subjected to true strict scrutiny.

IV. *Burson* cannot be read to reach "political" speech either inside polling places or within a specified distance outside them.

In *Burson*, as noted above, this Court considered the constitutionality of a Tennessee law that barred "the display of *campaign* posters, signs or other *campaign* materials, distribution of *campaign* materials, and solicitation of votes *for or against* any person or political party or position on a question" in polling places or within 100 feet of their entrances. *Burson*, 504 U.S. at 193 (plurality) (quoting Tenn. Code Ann § 2-7-111(b) (Supp. 1991) (emphasis added). The Eighth Circuit's extension of that limited prohibition to "political" materials is fraught with constitutional problems.

This Court and federal election law distinguish between campaign-related speech and political speech, and give greater protection to the latter. For example, in *Buckley*, the Court avoided overbreadth concerns by "reading [the Federal Election Campaign Act of 1971, as amended] as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (per curiam). And, it identified the words that signal express campaign advocacy: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Id.* at 44 n.52. The Court explained, "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45.

Chief Justice Roberts's opinion in *WRTL*, in which Justice Alito joined, drives the distinction home. Chief Justice Roberts noted that, in order to protect freedom of speech, "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469–70.

In this case, the clothing and button to which the Minnesota election officials objected constitute issue advocacy protected by the First Amendment. Cilek wanted to wear a Tea Party-associated Gadsden Flag T-shirt and a "Please I.D. Me" button. There is no suggestion that Cilek was interfering with the integrity of the election process or blocking access to the polls. There were no Tea Party candidates on the ballot, so no last-minute campaigning was going on. Likewise, voter ID is not required by Minnesota law. Accordingly, Cilek was engaged in issue advocacy, and *WRTL* holds that advocacy is protected by the First Amendment.

In contrast, *Burson* and *Marlin v. Dist. of Columbia Bd. of Elections*, 263 F.3d 716 (D.C. Cir. 2001), involve unambiguously campaign-related activity, which constitutes express advocacy and can be regulated. In *Burson*, the treasurer of a candidate for city council wanted to encourage voters to vote for her candidate. In *Marlin*, the Board enforced regulations that prohibited all "partisan or nonpartisan political activity, or any other activity which, in the judgment of the Precinct Captain, may directly or indirectly interfere with the orderly conduct of the election . . . in or within a reasonable distance outside the building used as a polling or vote counting place." *Marlin*, 236

F.3d at 718. Political activity was defined in terms of express advocacy as "any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." *Id.* Marlin was prohibited from entering the polling place while wearing a campaign sticker in support of a mayoral candidate. Viewing the polling place and its vicinity as a nonpublic forum, the appeals court reasoned, "[T]he district's decision to ban *campaign paraphernalia* from polling places is a reasonable means of ensuring an orderly and peaceful voting environment, free from the threat of contention or intimidation." *Id.* at 720 (emphasis added).

The Minnesota policy's application to political insignia is also overbroad. As Judge Shepherd asked, "[H]ow does the wearing of a button or a shirt bearing the American Flag or the Star of David, both of which could arguably be considered political under this statute, disrupt the 'peace, order, and decorum' of the voting booth?" App. D-18 n.7 (Shepherd, J., concurring in part and dissenting in part). Likewise, he noted that the statute could reach a shirt bearing words or the logo of an organization that participates in political activity like the "AFL-CIO" or the "NRA." *Id.* The problem comes from extending *Burson* to reach "the wearing of any political insignia in the polling place." *Id.* at D-16.

Plainly, the Minnesota law reaches broadly. Even if it were not too broad, the Court's modern doctrines require that it must be narrowly tailored to serve the compelling state interest involved.

V. The Minnesota law is not narrowly tailored to serve the State's interests.

Even if suppressing speech may "sometimes" be constitutional, "by demanding a close fit between means and ends, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency." *McCullen v. Coakley*, 134 S. Ct. 2513, 2534 (2014) (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). One way of enforcing the limits on government is to demand that, when it acts in a constitutionally sensitive area, it has a strong basis in evidence for doing so. Accordingly, "[w]hen applying strict scrutiny outside the context of conducting elections, courts generally require "a strong basis in evidence'" from the state. *Russell*, 784 F.3d at 1051; *see also Ricci v. DiStefano*, 557 U.S. 557, 582–83 (2009). Any limitation on speech also needs to be tied to a state interest of the magnitude required for the applicable level of scrutiny.

In *Burson*, the plurality recognized that the State had compelling interests in the integrity of the vote, as to preventing both vote fraud and the intimidation of voters. The Eighth Circuit also identified a "legitimate" state interest in "maintain[ing] peace, order, and decorum in the polling place." App. A-5 (internal quotation marks omitted).

The Minnesota law fails the strong basis in evidence test in several respects. The fit between the law and the State's interests are attenuated at best. Both within the polling place and within the bubble zone outside it, the suppression of speech bears no relation to the State's interests. In addition, there has been no showing that less intrusive measures are inadequate.

As Judge Shepherd notes in his dissent below, the record was "devoid of facts which demonstrate that any disruption of the 'peace, order, and decorum' of the Minnesota election process has occurred by virtue of voters wearing a political emblem, insignia, or slogan that is unrelated to an issue on the ballot." App. D-18 (Shepherd, J., concurring in part and dissenting in part). The absence of any such evidence is dispositive that Respondents failed to carry their burden of proving by a strong basis in evidence that Minnesota's law is narrowly tailored.

A. Neither the Gadsden Flag shirt nor the Please-ID Me button interfered with the State's interests in preventing vote fraud and intimidation.

In this case, there is no suggestion that Cilek was interfering with the integrity of the election process or blocking access to the polls. Absent such evidence, it is difficult to see any fit between the State's interests and its overly broad suppression of speech.

The Eighth Circuit drew on the plurality opinion in *Burson* to infer that, if political campaign speech within a certain distance outside the polling place could be banned, a parallel ban on political campaign speech inside the polling place was *ipso facto* constitutional. App. D-9 ("Because a statute restricting speech related to a political campaign outside the polling place survives strict scrutiny, the Minnesota statute, to the extent it restricts speech about a political campaign inside the polling place, is reasonable in light of the purpose which the forum at issue serves.") (internal quotation omitted). That reasoning blurs the distinction between campaign-related speech and other

political speech. Even so, its *ipso facto* reasoning runs the other way, such that what cannot be prohibited inside the polling place cannot be prohibited outside either.

The Eighth Circuit's reasoning is also upside down. The interests that most closely relate to the State's legitimate interests are those within the polling place. They need protection far more than the same interests outside the polling place. As a society, we do not want others telling us who to vote for or looking over our shoulders as we vote.

Thus, even if polling places are nonpublic fora, as Justice Scalia believed, *Burson*, 504 U.S. at 214–16 (Scalia, J., concurring in the judgment), Minnesota's ban on small lapel buttons supporting election-integrity measures such as voter-ID laws would still fail, because such a restriction does nothing to prevent voter fraud or voter intimidation. It is thus unreasonable. But under *Burson*'s public-forum rationale, the fact that a passive button supporting voter ID does not coerce any voter at the polling location makes it clear that the State's censorship regime here does not advance any compelling interests of preventing fraud or intimidation.

Banning campaign-related speech inside the polling place limits the potential effect of intimidation tactics and other coercive measures. Such tactics and influences can impact how the voter actually marks his ballot, thus corrupting his choice of who he votes for.

In contrast, the button and T-shirt at issue here have no impact on any voter's electoral choice. To the contrary, the button means, "Let's make sure

everyone's legal vote for their preferred candidate is legally counted." Such a message has nothing to do with the cases and scholarly authorities this Court considered in determining when to sustain buffer zones. *See Burson*, 504 U.S. at 206–11 (plurality).

Voter-ID buttons are also consistent with the Court's later decisions, including the Court's upholding of voter-ID laws. This Court's decisions subsequent to *Burson* "suggest that citizens should be expected to overcome minimal obstacles when voting." *Russell*, 784 F.3d at 1052 (citing, *e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203–04 (2008) (plurality opinion)). The right to cast a ballot is accompanied by a concomitant right to have that vote not corrupted by fraudulent or otherwise illegal ballots. J. Kenneth Blackwell & Kenneth A. Klukowski, *The Other Voting Right: Protecting Every Citizen's Vote by Safeguarding the Integrity of the Ballot Box*, 28 Yale L. & Pol'y Rev. 107, 109–10 (2010). This Court's more recent *Crawford* decision was predicated upon the importance of such a right to undiluted and uncorrupted vote tallies. *See Crawford*, 553 U.S. at 203 (plurality).

Moreover, voting is not only a right, it is a citizen's duty. Blackwell & Klukowski, *supra*, at 110–15. Judge Batchelder reasoned for the Sixth Circuit court that "citizens cannot demand as a constitutional entitlement an environment in which fulfilling this civic duty is effortless." *Russell*, 784 F.3d at 1052. To the contrary, the Constitution permits "election officials to presume that public-spirited citizens with due concern for the course of state and national policy should be willing to satisfy reasonable regulations and shoulder incidental burdens in the fulfillment of their civic duty."

Blackwell & Klukowski, *supra*, at 115. Given that voter-ID laws epitomize that principle, a button calling for the faithful enforcement of such laws to safeguard the integrity of the electoral process cannot be regarded as part of the evil that buffer zones are designed to combat.

Because such a law does not even exist in Minnesota and was not a question on the ballot, advocating it is irrelevant. The Court's precedent does not require infantilizing adult citizens to the extent necessary to think that they must be shielded from messages irrelevant to their voting decisions during an election. When examining the T-shirt instead, or similar shirts such as one with an NRA logo, the claim that the ban is truly essential to preventing intimidation and fraud becomes patently absurd. Voters in an advanced democracy are not delicate squash blossoms. "Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate [speech] delivered by a person of a different [belief]." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014).[3]

"The right against voter intimidation is the right to cast a ballot free from threats or coercion; it is not the right to cast a vote free from distraction or opposing voices." *Russell*, 784 F.3d at 1051. The apparel here need not even be regarded as an opposing voice,

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[3] The fact that *Town of Greece* was an Establishment Clause case is of no moment. The Court's reasoning regarding adult citizens not being coerced by merely observing speech they disagree with is true regardless of whether the speech in question is religious or political.

because it was irrelevant to what was on the ballot. An opposing voice would be messages advocating an opposition-party candidate or an opposing position on a ballot question. The apparel here is a distraction at worst—and a minimal one at that. There is no intimidation, no threat, and no coercion of any sort whatsoever. It is not encompassed by *Burson*'s holding regarding the extent to which political speech may be banned or restricted, even if stare decisis counsels this Court to give any weight to *Burson*.

Minnesota and the local Respondents have provided no such evidence that a law sweeping so broadly as to forbid Gadsden flag shirts or voter-ID buttons serves the State's compelling interests in preventing voter intimidation and election fraud. As a consequence, this Court "cannot find that the State carried even this relaxed burden in its effort to demonstrate that the [this statute] withstands strict scrutiny." *Id.* When coupled with the fact that the Court's subsequent cases make clear that the burden is not relaxed when political speech is barred, it becomes clear that the Eighth Circuit must be reversed.

B. *Burson*'s protection of the area around the polling place from any political activity is inconsistent with this Court's understanding of the First Amendment protection given to sidewalks and other public ways.

The question in *Burson* was "*how large* a restricted zone is permissible or sufficiently tailored." *Burson*, 504 U.S. at 208. Similarly, the question here is *how broad* a restricted zone is permissible or sufficiently

tailored. That is, *how many* species of speech must be restricted to satisfy the State's compelling interests.

In answering that question, central to any judicial inquiry is the principle that the Free Speech Clause is [p]remised on mistrust of government power." *Citizens United*, 558 U.S. at 340. Speech "concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1974). In elections, "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 558 U.S. at 361. The Eighth Circuit here failed to follow those instructions from the Court's precedents when considering whether a speech restriction so broad that it forbids overt support for fair and legal elections passes constitutional muster.

In *McCullen v. Coakley*, this Court noted that our "public way[s]" and "sidewalk[s] . . . 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *McCullen v. Coakley*, 134 S. Ct. at 2529 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (quoting in turn *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *see also Boos v. Barry*, 485 U.S. 312, 318 (1988). Notwithstanding the fact that *Burson* sustained a 100-foot buffer zone, *McCullen*'s holding that Massachusetts' 35-foot limit on speech was not sufficiently tailored to the government interest it served casts doubt on the continuing vitality of the legal rationale supporting the 100-foot limitation on political speech imposed by the Eighth Circuit.

As noted above, the Eighth Circuit relied on *Burson* for its holding. The *Burson* plurality and Justice Scalia rested their conclusions on a recitation of history that suggested sidewalks and public ways in the vicinity of polling places were not traditionally open to political activity. But this does not alleviate the evidentiary burden this Court requires when governmental burdens on certain fundamental rights trigger strict scrutiny. As Justice Stevens observed in dissent, reliance on history is misplaced because "it confuses history with necessity, and mistakes the traditional for the indispensable." *Burson*, 504 U.S. at 220 (Steven, J., dissenting). In addition, given the history of restriction, the conclusion has the air of a self-fulfilling prophesy. As the plurality recognized, "[T]he long, interrupted, and prevalent use of these statutes makes it difficult for States to come forward with the sort of proof the dissent wishes to require." *Id.* at 208 (plurality).

States still must proffer such proof, however, when they forbid citizens from speaking. It is certainly plausible that Minnesota could present evidence to support the concept of a buffer zone restricting active politicking and campaigning such as in *Burson*. Expert analyses from political scientists, psychologists, and other social behavior experts might provide support for something of this nature. But Minnesota must present very different evidence to carry its burden proving that campaigning bans are insufficient, and that the government must instead ban NRA hats and Gadsden flag T-shirts.

In *McCullen*, this Court unanimously held that a Massachusetts law which prohibited any person from "knowingly enter[ing] or remain[ing] on a public way or

sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit, or driveway" of the facility was unconstitutional. *McCullen*, 134 S. Ct. at 2526 (quoting Mass. Gen. Laws, ch. 266, § 120E 1/2(b)(West 2012)). Much less demanding than strict scrutiny, a majority of the Court held that the limitation on speech was content-neutral, but it failed intermediate scrutiny. *Id.* at 2534–40.

Likewise, in *Boos*, this Court held that a District of Columbia ordinance prohibiting the display of disparaging signs and the gathering of three or more people within 500 feet of a foreign embassy violated the First Amendment. It noted that by prohibiting disparaging signs "on public streets and sidewalks," it reached places that "occupy a 'special position in terms of First Amendment protection'" in which "the government's ability to restrict expressive activity 'is very limited.'" *Boos*, 485 U.S. at 318 (quoting *United States v. Grace*, 461 U.S. 171, 177, 180 (1983)). While the bubble involved is larger than the one here, that bubble was not necessary to vindicate the governmental interest in protecting the dignity of foreign diplomats. Put differently, the District of Columbia's 500-foot bubble failed the narrow tailoring test.

This Court should, likewise, look at whether Minnesota's restriction on political speech within a 100-foot bubble around polling places is narrowly tailored to protecting the State's interests.

C. Minnesota did not show that any less intrusive alternatives were inadequate to serve its interests.

"To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540. Yet again, the Court emphasized that the burden is on the government to show the need for its burden on speech. Minnesota's invocation of general considerations to justify its overly broad suppression of speech represents the choice of an easier route.

Subsequent to *Burson*, this Court's decisions have looked skeptically at whether less intrusive alternatives are adequate to protect the state's interests. In *McCullen*, for example, the Court rejected the contention that criminal laws were unworkable in preventing congestion around abortion facilities. It noted that obstruction could be addressed through local ordinances and by enforcing the state's criminal laws when warranted. *Id.* at 2538–39. The lack of criminal prosecutions and attempts to obtain injunctive relief demonstrated that Massachusetts could not show "that it seriously undertook to address the problem with less obtrusive tools readily available to it." *Id.* at 2539. "Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked." *Id.* at 2540.

In *McCullen*, the Court distinguished *Burson* and its approach. *Id.* at 2540. The *Burson* plurality rejected the contention that Tennessee should have relied on laws prohibiting intimidation and interference. *Burson*,

504 U.S. at 206–07. The *McCullen* Court found reliance on *Burson* to be "misplaced," explaining that the problem near abortion clinics and around polling places differed. *Id.* That said, the Court pointed to a number of potential criminal and administrative alternatives. *Id.* at 2538–39.

The Court explained,

> "The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.

Id. at 2539.

In the same way, this Court in *Boos* struck down a provision in the District of Columbia Code making it unlawful to display signs to which a foreign government might object within 500 feet of the country's embassy. It pointed to an "analogous" federal criminal law that criminalized willful acts or attempts to "intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties." *Id.* at 325 (quoting 18 U.S.C. § 112(b)(2)). The Court explained that the federal statute was "considerably less restrictive" than the District of Columbia Code provision. *Id.* at 326. Moreover, the federal statute represented the judgment of Congress, arrived at "after a careful balancing of our country's international obligations with our Constitution's protection of free expression," of how best to "satisfy] the Government's interest in

protecting diplomatic personnel outside the District of Columbia." *Id.* In short, the "congressional development of a significantly less restrictive statute" that protected the governmental interests at stake counseled against "giv[ing] deference to a supposed congressional judgment that the [Vienna] Convention [on Diplomatic Relations] demands the more problematic approach reflected in the display clause." *Id.* at 326–27.

Instead of hiding behind *Burson*, the Eighth Circuit should have required Minnesota to show that less intrusive alternatives were not adequate. Respondents failed to do so.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amicus* brief, this Court should reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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No. 16-1435

IN THE

Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL.,

Petitioners,

v.

JOE MANSKY, IN HIS OFFICIAL CAPACITY AS THE ELECTIONS MANAGER FOR RAMSEY COUNTY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, AND THE LEAGUE OF WOMEN VOTERS MINNESOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote and prevent intimidation, discrimination, and disruptions at the polls. The Brennan Center conducts empirical, qualitative, historic, and legal research on electoral practices, including on laws and regulations governing polling site activity. The Center has litigated cases involving regulation of polling sites, and submitted numerous *amicus* briefs in this Court on voting rights and other democracy issues.

The League of Women Voters of the United States ("League") is a nonpartisan, community-based organization that encourages Americans to participate actively in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 150,000 members and supporters, and is organized in approximately 750 communities in every state. Since its founding, the League has led

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[1] Pursuant to Supreme Court Rule 37, *Amici Curiae* state that counsel for *Amici* authored this brief in its entirety. No person or entity other than *Amici* and their supporting organizations made a monetary contribution to the preparation of this brief. This brief does not purport to convey the position, if any, of the NYU School of Law. All parties have filed blanket consents to the filing of *amicus* briefs.

efforts to remove barriers that Americans face in registering to vote and casting a ballot.

The League of Women Voters Minnesota ("LWVM") is the state affiliate of the League. It is a nonpartisan political organization, which encourages informed and active participation in government. There are 35 local Leagues around the state. The LWVM has fought unlawful voter restrictions and believes that voting is a fundamental citizen right that must be guaranteed. The LWVM's local Leagues register voters, perform public education, conduct research, and engage with public officials on issues related to registration and voting.

INTRODUCTION

At issue in this case is the constitutionality of a state law that regulates speech inside of polling places in order to protect the integrity and fairness of the voting process. Petitioners challenge a century-old portion of Minn. Stat. § 211B.11(1) that proscribes individuals from wearing "a political badge, political button, or other political insignia at or about the polling place on primary or election day."[2] While the word "political" is undefined, Minnesota campaign law provides elsewhere that "[a]n act is done for 'political purposes' when the act

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[2] Minnesota is far from the only state that regulates apparel inside of polling locations. *See, e.g.*, Cal. Elec. Code § 18370; *id.* § 319.5; Del. Code Ann. tit.15 § 4942; Ind. Code Ann. § 3-14-3-16; Kan. Stat. Ann. § 25-2430; Mont. Code Ann. § 13-35-211; Nev. Rev. Stat. § 293.740; N.H. Rev. Stat. Ann. § 659:43; N.J. Stat. Ann. § 19:34-19; N.Y. Elec. Law § 8-104; S.C. Code Ann. § 7-25-180; Tenn. Code Ann. § 2-7-111; Tex. Elec. Code Ann. § 61.010; Vt. Stat. Ann. tit.17 § 2508.

is intended or done to influence, directly or indirectly, voting at a primary or general election." Minn. Stat. § 211B.01(6).

In accordance with the law, election officials under the direction of Respondents prohibited Petitioners from wearing two types of apparel inside of polling locations: buttons with the message "Please I.D. Me," which were distributed as part of a volunteer "election integrity" effort and intended to encourage poll workers to check voter identification (despite Minnesota having no such requirement); and shirts bearing the name and various slogans of the Tea Party. *See, e.g.*, J.A. 40–42; J.A. 44–45; J.A. 47–51; J.A. 114–15. The record before the Court contains no examples of election officials in Minnesota excluding any other apparel from polling places pursuant to the challenged statute. After this case commenced, Respondents did issue an "election day policy," one prong of which suggests that they would bar any apparel "promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." App. I-1 to I-2. However, the record contains no evidence that the policy was applied other than to Petitioners' apparel.

Amici submit this brief to underscore that application of Minnesota's law to Petitioners was proper and indeed necessary to safeguard First Amendment-protected voting rights. Most importantly, the State has a compelling interest in preventing Petitioners from wearing buttons that falsely imply identification is required to vote, which would exacerbate the considerable confusion that already exists around this issue. The Court can easily address any other applications of the statute it

deems problematic without taking the extreme step of ruling the law itself facially unconstitutional.

SUMMARY OF ARGUMENT

There are important First Amendment interests on both sides of this case. On one side is the right to engage in political expression, which Petitioners seek to exercise by wearing political messages into polling places. On the other side is the right to vote, which Respondents seek to safeguard by prohibiting political messages that interfere with the voting process. Both the right to free speech and the right to vote are critical to representative democracy in the United States.

In other words, this is not a case in which First Amendment rights must yield to some governmental purpose unrelated to the First Amendment. Limits on some types of speech in the polling place themselves can further important First Amendment interests, because the main purpose of a polling place is to facilitate a different First Amendment-protected right: the right to vote. To the extent that Minnesota's statute is reasonably targeted to protect the right to vote, it should be upheld.

The challenged statute's prohibition on political messages in the polling place safeguards the right to vote in two ways. First, as interpreted by the state, it prohibits apparel or signs about the voting process that are likely to sow confusion in polling places or to intimidate voters. The "Please I.D. Me" buttons that Petitioners were prevented from wearing are precisely the kinds of communications likely to disrupt the voting process. Extensive studies show that a large share of poll workers and voters nationwide misunderstand the voter identification rules in their

states. In Minnesota, identification is not required to vote (except under relatively rare circumstances required by federal law). Petitioners' "Please I.D. Me" buttons thus risked substantially exacerbating confusion over voter I.D. requirements by implying otherwise. Indeed, that was their intent. As the district court found, they were part of "an orchestrated effort to falsely intimate to voters in line at the polls that photo identification is required." *Minn. Majority v. Mansky*, 62 F. Supp. 3d 870, 876 (D. Minn. 2014) (*Mansky I*). This could have caused some voters without I.D. to leave the polling place without casting a ballot, or poll workers to improperly request identification. The First Amendment must not bar a state from preventing this kind of disruption of its voting process.

Second, the statute prohibits campaign paraphernalia, and paraphernalia closely tied to candidates and campaigns, inside polling places. This Court has already found that state laws barring campaign messages outside polling places serve the state's interest in protecting the voting process. It is reasonable for Minnesota to extend that ruling to similar messages *inside* a polling place, and to a group that, while not a political party itself, has the primary institutional objective of electing a certain type of Republican candidate to public office.[3]

These are the only actual applications of the statute that Petitioners challenge. Every other

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[3] Petitioners originally brought an equal protection claim alleging that they were singled out and treated differently from other similarly-situated persons. J.A. 85–87. That issue is not before the Court. No statement herein should be interpreted to endorse any effort to single out Petitioners or others for disparate treatment because of their beliefs.

example they raise is hypothetical. The question in a facial overbreadth challenge is whether a law prohibits enough protected speech such that its overbreadth is "*substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008) (citations omitted). Here, application of the challenged statute to Petitioners was within the law's "plainly legitimate sweep." *See* Parts II and III(A), *infra*. Petitioners have not provided a single example of Minnesota officials prohibiting apparel in a polling place that should have been allowed. The mere possibility of some hypothetical application of the law in a way that would curtail protected speech is not enough to sustain an overbreadth challenge.

To the extent Petitioners' more sweeping hypotheticals have any credence, the problem is not with the statute itself, but with Respondents' broad interpretation of the statute memorialized in their election day policy—specifically the portion of that policy barring any apparel from a group with "recognizable political views." Striking down the law itself as unconstitutionally overbroad would be an unnecessary and disproportionate response to this very specific potential defect. To the extent the Court finds this interpretation problematic, a saving construction would preserve the core of the statute, including its goal of preventing voter intimidation and confusion. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 111–12 (1990). *Amici* urge the Court to adopt a targeted approach and avoiding striking down the statute in its entirety.

ARGUMENT

I. The Challenged Law is Justified to the Extent It Reasonably Protects the First Amendment Right to Vote

As Respondents persuasively argue, under this Court's precedents, the interior of a polling place is a nonpublic forum in which reasonable, viewpoint-neutral limits on speech are permissible. *See* Resp't Br. 25–39. In weighing the reasonableness of Minnesota's law, the Court should consider the extent to which any burden on speech imposed by that law is justified by other First Amendment interests.

The First Amendment guarantees freedom of both speech and association. This Court has long held that freedom of association includes "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" in conjunction with their fellow citizens. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). First Amendment protections for speech complement those for voting. Freedom of expression enables an "open market place" of ideas, which fosters an informed electorate capable of self-government. *Knox v. SEIU*, 567 U.S. 298, 307–09 (2012). And self-government in a representative democracy "is unimaginable without the ability of citizens to band together" at the ballot box to elect their chosen candidates. *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567,

574 (2000)). Without the ability to vote, the right to speak loses one of its most important purposes.[4]

The fact that speech and voting rights are complementary does not preclude them from coming into tension. The risk of such tension is especially high at a polling place, which is an enticing locale for political expression, including expression that could be disruptive to the voting process. Under these circumstances, "the First Amendment permits freedom of expression to yield...for the accommodation of another constitutional right"—that is, the right to vote. *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring). At least within the narrow confines of the polling place, the right to vote must be paramount, and states should be allowed to use reasonable means to safeguard it.

II. Safeguarding Voting Rights is a Compelling Interest that Justifies Prohibiting the "Please I.D. Me" Buttons in Polling Locations

In this case, the State had a compelling interest in prohibiting Petitioners' "Please I.D. Me" buttons: protecting voters from confusion and intimidation. *See, e.g., Burson*, 504 U.S. at 199 (plurality op.) ("[T]his Court has concluded that a State has a

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[4] Of course, the First Amendment also protects individual expression and association as a means for self-fulfillment and creative expression. But the strongest motivation for guaranteeing these rights was to promote enlightened self-government within the framework of a representative democracy. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 15 (1976) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.") (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

compelling interest in protecting voters from confusion and undue influence.") (citing *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989)); *id.* at 200 (recognizing "necessity of restricted areas in or around polling places"). *Burson* addressed electioneering bans, but activity beyond just electioneering can impact the fundamental right to vote. Efforts to mislead voters, poll workers, and others about the voting process, including voter identification requirements, also pose heightened concerns. That was the explicit goal of the "Please I.D. Me" buttons. These buttons did not simply convey a point of view; they called on poll workers to take action (check voter identification) that was improper under Minnesota law. *See Mansky I*, 62 F. Supp. 3d at 876.[5] The state was more than justified in prohibiting them to prevent voter confusion and intimidation and to ensure proper election administration.

A. There Is Already Widespread Confusion About When Identification is Required to Vote

Political science research over the past decade consistently finds a widespread mistaken belief among both voters and poll workers that identification is required to vote in jurisdictions that have no such requirement. Some of that confusion stems from poll workers who simply do not know the law. Voters themselves also are frequently

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[5] In fact, Minnesota voters decisively rejected an effort to insert such a requirement into the state's constitution. *See* Minn. State Leg., *State Constitutional Amendments Considered*, https://goo.gl/VveoV2 (last visited Feb. 2, 2018) (showing rejection of constitutional amendment "[t]o require all voters to present valid photo identification to vote" by margin of more than 170,000 votes).

misinformed. Both poll worker and voter confusion disproportionately affects non-white voters.

1. Poll worker confusion

Poll worker confusion over voter identification requirements is well documented in recent scholarship. For example, a survey of over 10,000 voters in the 2012 presidential election found that "12% of voters in non-identification states were still required to show photo identification in order to vote." *See* Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 47 (2017). A poll worker survey analyzing New Mexico's November 2008 election found that poll workers "tend to rely on their own attitudes and beliefs rather than the law and their training." Lonna Rae Atkeson et al., *Who Asks For Voter Identification? Explaining Poll-Worker Discretion*, 76 J. POL. 944, 954 (2014). That survey also found that "some poll workers ignore the law and instead rely on their feelings and attitudes about the way voter identification should be administered." *Id.* Unsurprisingly, the study found evidence of poll workers asking voters to show a form of identification, despite that being "contrary to New Mexico election law," with alarming regularity: more than a third of survey respondents reported having asked for identification "very often" or "somewhat often." *Id.* at 950.

Another study that examined the 2006 general election and the 2008 presidential "Super Tuesday" primaries similarly found inconsistent poll worker requests for voter identification due to ignorance of the law. *See* Stephen Ansolabehere, *Effects of Identification Requirements on Voting*, 42 PS: POL. SCI. & POL. 127 (2009). The study flatly concluded that "poll workers commonly ask voters for photo

identification, even in places where they are not allowed to." *Id.* at 128.

Moreover, the study's survey results revealed the troubling trend that "poll workers do not administer [voter identification] procedure[s] fairly or without regard to race." *Id.*[6] A study examining the 2012 presidential election similarly found that in jurisdictions where identification was not required under applicable state law, "African American and Hispanic voters were much more likely to be required to show identification than were white voters—1.6 times more likely, in the case of black voters, and more than 2.5 times more likely in the case of Hispanics." *See* Stewart, *supra*, at 48.

2. Voter Confusion

When election officials themselves are unsure about voter identification requirements, it should come as little surprise that there is substantial confusion among voters about whether identification is needed to vote. Indeed, a report on the 2014 election from the Lawyers' Committee for Civil Rights Under Law found that "[u]ncertainty about voter ID requirements was exacerbated by poll workers who incorrectly asked voters for ID or who asked voters for a form of ID that was not required in their state." Law. Committee for Civ. Rts. Under Law, *The 2014 Election Protection Report: Democracy Should Not Be This Hard* 35 (2015), *available at* https://goo.gl/j1g7ge.

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[6] The 2008 Super Tuesday primary surveys revealed that 53% of white voters reported being asked to show identification at the polls, while 58% of Hispanic voters and 73% of African American voters reported the same. Those racial disparities "persisted upon holding constant income, education, party identification, age, region, state laws, and other factors." *Id.* (citation omitted).

That group's analysis of calls received by the Election Protection national voter hotline in the 2016 election found that voter confusion over identification requirements was a top barrier to voting. Law. Committee for Civ. Rts. Under Law, *Striving to Protect Our Vote in 2016* at 1 (2016), *available at* https://goo.gl/ne3kQa.

In the months preceding the 2016 general election, the Pew Research Center conducted a national survey to gauge voters' knowledge of voter identification requirements. The results were striking. Nearly 40% of voters "living in states with no identification requirement incorrectly believe that they will be required to show identification prior to voting." Bradley Jones, *Many Americans Unaware of Their States' Voter ID Laws*, Pew Research Center, (Oct. 24, 2016), https://goo.gl/pXzuZy. Here, as well, there was a substantial racial disparity in the results, with African-American and Hispanic voters more likely to incorrectly believe that identification was required. 31% of white voters in states with no voter identification requirement incorrectly believed that identification was required, compared to 51% of African-American and 53% of Hispanic voters. *See id.*

Widespread confusion was found even among voters in states that have an identification requirement: 22% of such voters did not know that identification would be needed to vote. *Id.* Another study assessing the impact of Wisconsin's voter identification law on turnout in the 2016 election found that roughly a third of voters "had not seen information about the voter ID requirements during the campaign," implying that a significant number of voters were in the dark about the law. Kenneth R. Mayer & Michael G. DeCrescenzo, *Questions and*

Answers about the Voter ID Study: Estimating the Effect of Voter ID on Nonvoters in Wisconsin in the 2016 Presidential Election, Elections Res. Center at the Univ. of Wisc., (Sept. 25, 2017), *available at* https://goo.gl/FbMX95.[7] Press reports have also captured voters' misunderstanding of identification requirements.[8]

In short, voter identification rules already sow considerable confusion that can impact the ability of many voters, and especially voters of color, to cast their ballots.

B. The "Please I.D. Me" Buttons Likely Would Have Exacerbated Confusion, Contributed to Maladministration of the Voting Process, and Deterred Eligible Voters from Casting Ballots

Given voter uncertainty about identification requirements and the ignorance of many poll workers, the "Please I.D. Me" buttons—which falsely implied that identification was required to vote—were likely to exacerbate confusion among voters and poll

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[7] *See also* Kenneth R. Mayer & Michael G. DeCrescenzo, *Supporting Information: Estimating the Effect of Voter ID on Nonvoters in Wisconsin in the 2016 Presidential Election*, Elections Res. Center at the Univ. of Wisc., (Sept. 25, 2017), *available at* https://goo.gl/SVsctZ.

[8] *See, e.g.*, Patrick Marley, *Wisconsin voters are confused over ID law, professor tells election officials*, Milwaukee Journal Sentinel ,Dec. 12, 2017, *available at* https://goo.gl/jm4NVq; Jessica Huseman, *Texas Voter ID Law Led to Fears and Failures in 2016 Election*, ProPublica, May 2, 2017 https://goo.gl/rBjvZB; Rebecca Beitsch, *New voter ID rules, other election changes could cause confusion*, PBS News Hour, Oct. 19, 2016, https://goo.gl/Mia4o1; Adam Brandolph, *Voters report problems with long lines, confusion over voter ID law*, Pittsburgh Tribune-Review, Nov. 6, 2012, *available at* https://goo.gl/qEN8eK.

workers. This, in turn, could have deterred significant numbers of eligible voters from exercising their fundamental rights at the polls.

In fact, that seems to have been the point. The record shows that the "Please I.D. Me" buttons were part of a broader "election integrity" effort intended to keep individuals whom the participants perceived as ineligible from voting. This was no secret. As the website of the coalition behind that effort explained:

> While Minnesota does not require an individual to show an ID, let's act like it does. This simple act of showing an ID will likely result in a spontaneous reaction from others in line behind you to show their ID as well. Any person in line thinking about committing voter impersonation will likely be dissuaded from doing so.

J.A. 104–05. The reality is that in-person voter fraud is vanishingly rare. *See* Philip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Election*, Wash. Post, Dec. 1, 2016, https://goo.gl/HGuVKo; Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of 1 Billion Ballots Cast*, Wash. Post, Aug. 6, 2014, https://goo.gl/fUe4GY; Justin Levitt, Brennan Ctr. for Justice, *The Truth About Voter Fraud* (2007), *available at* https://goo.gl/YswC6J; *Myth of Voter Fraud*, Brennan Ctr. for Justice, https://goo.gl/gKDmGv (last visited Feb 11, 2018) (collecting studies).[9] In effect, the

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[9] *See also, e.g, Veasey v. Abbott*, 830 F.3d 216, 238 (5th Cir. 2016) (en banc) (noting record of only two convictions for in-person voter fraud out of 20 million votes cast in Texas), *cert. denied* 137

primary people that such efforts would have likely dissuaded from voting would have been eligible voters lacking identification, which, as noted, Minnesota does not require to vote.

More broadly, there is evidence that such "election integrity" efforts foster an intimidating environment that drives eligible voters away from the polls. An exhaustive review of ballot security operations by the Republican National Committee from the 1980s through 2008 found multiple instances of voter intimidation and discriminatory behavior. *Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 196-99 (3d Cir. 2012) ("DNC v. RNC"), *cert. denied*, 568 U.S. 1138 (2013). Other reviews of volunteer "ballot security" operations,[10] including efforts to challenge to voters at the polls,[11] demonstrate the risk

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S.Ct. 612 (2017); *Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 212 (3d Cir. 2012) ("*DNC v. RNC*") (noting rarity of of in-person fraud), *cert. denied*, 568 U.S. 1138 (2013); *see also Frank v. Walker*, 773 F.3d 783, 788 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) ("Voter impersonation fraud... is by all accounts a tiny subset, a tiny problem, and a mere fig leaf for efforts to disenfranchise voters...."); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194 (2008) (acknowledging "no evidence of any [in-person] fraud actually occurring in Indiana at any time in its history").

[10] *See* Wendy Weiser & Adam Gitlin, Brennan Ctr. for Justice, *Dangers of "Ballot Security" Operations: Preventing Intimidation, Discrimination, and Disruption* 4 (2016), *available at* https://goo.gl/dLwzvd ("In addition to interfering with the rights of targeted voters, ['ballot security' operations] risk[] disrupting polling places and creating longer lines.").

[11] *See* Nicolas Riley, Brennan Ctr. for Justice, *Voter Challengers* 11 (2012), *available at* https://goo.gl/93DMXk ("When challengers become overly aggressive, they can disrupt the voting process, cause delays, and wreak chaos inside the polls on Election Day. . . . Even when challengers are not deliberately

that disruptive behavior in or around the polling place could keep eligible voters from voting. Not only do such disruptions intimidate voters, they also contribute to the problem of long lines that make the voting process more time-consuming and burdensome. A study of the 2008 election found that roughly a fifth of non-voters cited long lines as a factor in their decision not to vote. R. Michael Alvarez, Stephen Alsolabehere, Adam Berinsky, Gabriel Lenz, Charles Stewart III & Thad Hall, *2008 Survey of the Performance of American Elections: Final Report* 36 (2009), *available at* https://goo.gl/bJW4mQ.

Petitioners are, of course, entitled to advocate for their views as to how voting should be conducted; however, the State has a compelling interest in keeping that advocacy out of the polling place to ensure orderly voting free of disruption and intimidation.

III. Respondents' Interpretation of Minnesota Law to Bar Tea Party Apparel Inside the Polling Place Does Not Render the Law Unconstitutional

Apart from the "Please I.D. Me" buttons, the only other apparel that Petitioners sought to wear, and that Respondents barred inside polling locations, bore the name and various slogans association with the Tea Party. *See, e.g.*, J.A. 72 ¶ 46 - 47; J.A. 109 ¶ 11; J.A. 114 ¶ 5. Amici take no position on the merits of such a restriction as a matter of policy, but it was reasonable and therefore constitutional under longstanding precedents governing restrictions on

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disruptive, their actions can nevertheless interfere with the voting process at the polls.").

political apparel inside polling locations. To the extent the Court is concerned about potentially more sweeping applications of Minnesota's law, it is unnecessary to declare the law facially unconstitutional to address those concerns.

A. Well-Established Precedents Permit the State to Prohibit Tea Party Apparel Inside Polling Locations

It is well-established that states may restrict electioneering in and around polling places. *E.g.*, *Burson*, 504 U.S. at 214 (Scalia, J., concurring in the judgment) ("[R]estrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot."). Indeed, all fifty states and the District of Columbia do so to some extent; many of these laws, like Minnesota's, date back more than a century. *See, e.g.*, Michael Odell Walker, *"Don't Show Them Where To Click And Vote:" An Assessment of Electioneering Law in the United States as a Consideration in Implementing Internet Voting Regimes*, 91 KY. L.J. 715, 747 (2002) (compiling electioneering statutes); Resp't Br. 4-6. As in *Burson* and its progeny, moreover, electioneering restrictions may include limits on the passive display of candidate and party paraphernalia, including clothing. *See, e.g.*, *Burson*, 504 U.S. at 210–11 (plurality op.); *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716 (D.C. Cir. 2001); *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993).

The Tea Party, although not technically a political party, is nonetheless a political movement primarily directed toward electing candidates to political office. Its major goal, as expressed by its own leaders in Minnesota and elsewhere, is to elect a certain type of

conservative, anti-establishment Republican. *See, e.g.*, Congresswoman Michele Bachmann, Right Online Conference Keynote Address (July 23, 2010), *available at* https://goo.gl/qBvEhe ("We are knocking on doors, we are dropping literature, we are organizing phone banks, because we are going to take back this country the first Tuesday of November."); Rand Paul, THE TEA PARTY GOES TO WASHINGTON 4 (2011) ("The national Republican Party, the Kentucky establishment, K Street and virtually every power broker in Washington, D.C., had all lined up to oppose me like no other candidate running in 2010. The entire political establishment had my primary opponent's back. Luckily, the Tea Party had mine."); Jenny Beth Martin, *While MSM Proclaims Its Death, the Tea Party Builds an Army*, Breitbart (May 9, 2012), https://goo.gl/aZx8Qz ("After his defeat at the hands of the Tea Party, soon-to-be former Senator Dick Lugar can tell you, the Tea Party is not only alive but they are also organized to fight, and win....The next big battle ground in which the Tea Party will exercise its more refined skills is the June 5 recall election in Wisconsin."); *see also* Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 PERSPECTIVES ON POL. J. 25, 35 (Mar. 2011), *available at* https://goo.gl/YUNyJv (describing Tea Party efforts to reshape the Republican Party).

At the time this case arose, there was even a Tea Party Caucus in the U.S. House of Representatives. Its members were all Republicans, and Congresswoman Michele Bachmann of Minnesota was its chair. A study that examined voting behavior in the 111th and 112th Congresses found that the Tea Party had "party like" effects in Congress. Jordan M. Ragusa & Anthony Gaspar, *Where's the Tea Party? An*

Examination of the Tea Party's Voting Behavior in the House of Representatives, 69(2) POL. RES. Q. 361, 369 (2016).

In short, while Tea Party members (like mainstream Republicans and Democrats) clearly are motivated by a variety of issues, the Tea Party as a brand is expressly partisan and focused primarily on winning elections. There is nothing wrong with that. But it is at most a minor extension of existing doctrine to hold that, within the narrow confines of the polling place, a state can restrict Tea Party apparel (and that of its progressive equivalents like Our Revolution associated with the Democratic Party) to the same degree as that of candidates and parties. Respondents' interpretation of their statute to do so was not unconstitutional.

B. Any Concerns About the Scope of Respondents' Interpretation of the Statute Call for Targeted Solutions and not the "Strong Medicine" of Unconstitutional Overbreadth

Just because the First Amendment allows Minnesota to regulate speech in non-public forums does not mean that the State has carte blanche to restrict any speech it wants inside a polling place. But, as explained above, that is not this case.

The overbreadth doctrine is "strong medicine," and has a tendency "to summon forth an endless stream of fanciful hypotheticals." *Williams*, 553 U.S. at 301 (Scalia, J., concurring). Yet hypotheticals alone do not suffice to declare an otherwise valid statute facially overbroad and unconstitutional. *See, e.g., id.* at 301; *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some

impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.").

To the extent Petitioners' hypotheticals have any credence, it is due not to the statute itself but to Respondents' interpretation of it, specifically the prong of their election day policy barring all apparel "promoting a group with recognizable political views . . . ." App. I-1 to I-2. But the mere existence of that policy and off-the-cuff statements from officials also is generally insufficient to sustain an overbreadth challenge without any evidence of protected speech having been barred. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 617–18 (1973) (rejecting overbreadth challenge where relevant official interpretation of statute "may be susceptible of some . . . improper applications" but evidence of actual violations was lacking); *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (interpretation that gave officials "unfettered discretion" to deny permission to demonstrate or leaflet on governmental property would be insufficient basis to find underlying written policy unconstitutionally overbroad absent evidence of actual First Amendment violations).

The absence of any documented unconstitutional applications in the record is especially relevant where, as here, the law in question itself safeguards important First Amendment interests, and is also readily suspectible to a narrower interpretation that would obviate any constitutional infirmities.

If the Court feels Respondents have gone too far, there are less extreme alternatives to ruling the statute facially overbroad and unconstitutional. The Court can, for example, uphold the statute without endorsing the full scope of the election day policy,

leaving future plaintiffs who wish to wear issue group apparel from organizations like the NRA or the Sierra Club free to bring as-applied challenges.

Alternatively, the statute is readily susceptible to a limiting construction that would preserve its core goals and its constitutionality. This Court follows a "cardinal principle" that, before finding a statute unconstitutionality overbroad, it "will first ascertain whether a construction is fairly possible that will contain the statute within constitutional bounds." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997) (internal quotations and elipses omitted). It routinely applies such limiting constructions to federal statutes. *See, e.g., Skilling v. United States*, 561 U.S. 358, 405 (2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.") (citations omitted); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988) (limiting scope of 29 U.S.C. § 158(b)(4) to avoid "serious constitutional questions"). When confronted with a state statute that has not been interpreted, the Court has typically availed itself of state certification procedures to obtain an authoritative ruling from the state's highest court before ruling on the statute's constitutionality. *Arizonanas for Official English*, 520 U.S. at 79.

In this case, the word "political" in the challenged portion of Minn. Stat. § 211B.11(1) could be construed to extend only to apparel that any reasonable person would view as electoral advocacy (including advocacy for candidates, parties, and ballot questions) and any other apparel designed to confuse or intimidate voters or poll workers at the time of voting. *Cf., e.g., Skilling*,

561 U.S. at 408-09 (limiting scope of "honest services fraud" under 18 U.S.C. § 1346). This construction would admittedly invalidate Respondents' election day policy to the extent it prohibits the apparel of *any* group with "recognizable political views," including issue-focused organizations like the NRA or the Sierra Club. However, it would still be consistent with the definition of "political purposes" in Minn. Stat. § 211B.11(6), and would continue to further the statute's core goal of ensuring a smooth voting process free from intimidation or confusion. Resp't Br. 2; *see also id.* at 56-58.[12]

In sum, the Court need not embrace every possible application of Minnesota's statute or every aspect of Respondents' election day policy to uphold the law. However the Court rules, it should leave the State free to pursue the compelling voter protection interests at the heart of this case.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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[12] Amici respectfully disagree with Petitioners and Amici who argue that the statute is not susceptible to such a limiting construction. To the contrary, such a limiting construction—defining "political" in the law to reach electoral advocacy and efforts to confuse or intimidate voters—would be in accord with both the statute's text and its overriding purpose to serve the State's interest in protecting voters from undue confusion and intimidation.

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No. 16-1435

In the Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, *et al.*,
Petitioners,

v.

JOE MANSKY, in his official capacity as Elections Manager for Ramsey County, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Campaign Legal Center, Inc. ("CLC") is a nonpartisan, nonprofit legal organization whose mission includes implementing and defending laws that ensure fair and peaceful administration of the voting process. CLC generates public policy proposals and participates in state and federal court litigation throughout the nation on a range of election law topics. CLC has served as *amicus curiae* or counsel on numerous election law cases in this Court and in federal and state courts throughout the nation.

SUMMARY OF ARGUMENT

Minnesota possesses the constitutional authority to impose viewpoint-neutral limits on the display of political messages in its polling places, which are not public forums. As respondents ably explain, to pass constitutional muster, Minnesota need only show that its limits are "reasonable." Resps.' Br. at 40-41. *See also, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). In fact, the provisions at issue here would pass any level of constitutional scrutiny because they serve numerous compelling government interests, including the interests in protecting citizens' right to vote freely and ensuring that elections are conducted with integrity and reliability—interests this Court recognized in *Burson v. Freeman*, 504 U.S. 191, 198-

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

99 (1992) (plurality op.). These limits also serve the compelling interests of affording voters the opportunity to peacefully contemplate their choices, uniting citizens in the fulfillment of American democracy, and preventing discrimination against voters based on their political affiliation. Any burdens on expression arising from these reasonable restrictions are temporally, geographically, and functionally minimal. And the allegedly unconstitutional applications of this statute are almost entirely hypothetical, as well as insubstantial compared to the statute's plainly legitimate sweep.

Minnesota has a compelling interest in ensuring that its voters are afforded a few moments of tranquility and peaceful contemplation before they vote. This Court recognized such an interest in *Burson*, which deemed constitutionally permissible a Tennessee ban on political signage within 100 feet of polling places. Minnesota's provisions directly advance the same interest by helping voters remain undisturbed once inside the polling place, thereby giving them a chance to calmly contemplate their electoral choices at the culmination of the democratic process.

Minnesota's limits also serve its compelling interest in uniting the electorate and emphasizing the universality of the American polity. Election Day is often preceded by a lengthy period of campaign-induced partisan rancor and political tribalism. Election Day is therefore also the turning point at which campaign-induced tensions must begin to subside. Minnesota has a compelling interest in ensuring that its polling places serve as dignified reminders to all voters that electoral results—even if disappointing to some—reflect the collective judgment

of the fellow Americans with whom they just stood in line.

Moreover, Minnesota has a compelling interest in preventing discrimination—whether intentional or subconscious, overt or subtle—by poll watchers and poll workers against voters based on actual or perceived political affiliation. Minnesota's ban on political paraphernalia is an important prophylactic measure to prevent discriminatory tactics based on signals of how voters intend to cast their ballots.

These compelling interests far outweigh the statute's minimal burden on expression. Voters need only remove their political buttons or cover their shirts for the few minutes they spend in a polling place. They may display any message or electioneer however they wish until they enter and as soon as they leave the polls.

Finally, the provisions at issue here are not facially overbroad simply because there *might* be unconstitutional applications. This Court's overbreadth doctrine requires a plaintiff to show "that a statute's overbreadth [is] *substantial* . . . relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). But petitioners and supporting *amici* rely almost entirely on hypothetical situations, few or none of which have ever actually happened, and most of which would not be covered on the face of the statute in any event. When considering overbreadth, this Court should "be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). To the extent this Court concludes that the statute sweeps too far, that concern can easily be addressed through

as-applied challenges or by imposing a limiting construction on respondents' implementing policies.

ARGUMENT

I. Compelling Government Interests Justify Limits on Political Expression in the Polling Place.

Minnesota's prohibition on political paraphernalia in the polling place serves a compelling state interest by fostering peaceful contemplation at the moment of voting. In *Burson*, this Court held that Tennessee had made a constitutionally permissible choice in "decid[ing] that the[] last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible." 504 U.S. at 210 (plurality op.). Just as Tennessee had an interest in preserving for Tennesseans those last fifteen seconds, so too does Minnesota have an interest in preserving for Minnesotans the serenity and contemplation of the last few minutes before and while they vote. Indeed, Minnesota's interest is stronger than Tennessee's: the interest in preserving serenity for voters for the fifteen seconds *before* they enter the polling place necessarily presumes that this serenity will not evaporate *inside* the polling place. This Court's recognition in *Burson* of Tennessee's interest in maintaining this time at or near the polling place as a voter's "own, as free from interference as possible," compels the recognition of Minnesota's interest here.

Courts have recognized that the government has an interest in promoting a "tranquil" environment at public monuments in order to preserve their "contemplative mood." *Henderson v. Lujan*, 964 F.2d

1179, 1184 (D.C. Cir. 1992); *cf. Oberwetter v. Hilliard*, 639 F.3d 545, 552-53 (D.C. Cir. 2011) (noting that monument grounds serve "solemn commemorative purpose" and are not "freewheeling forums"). There is perhaps no site more important than the polling place where the government has a compelling interest in maintaining a "contemplative mood," free from the distractions of both overt and subtle partisan rancor. The voting process is nothing short of sacrosanct. When voters cast their ballots, they convey enormous responsibility and power to those who will govern them. The act of casting a ballot "is preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Minnesota therefore has a compelling interest in ensuring that, when a voter undertakes this act, she is afforded the opportunity to peacefully contemplate the substance of her decision. Subjecting the voter to a "visual assault" of political slogans, *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984), is at odds with safeguarding her opportunity to contemplate her decision as a participant in the democratic system of self-government.

Minnesota's restrictions also serve a compelling state interest in uniting the electorate. Our country is increasingly polarized; more than ever, citizens doubt the good faith of their political counterparts in other parties. *See* Pew Research Ctr., *The Partisan Divide on Political Values Grows Even Wider* 1-4, 65-66 (2017); *see also*, Pew Research Ctr., *Political Polarization in the American Public* (2014). Simply put, there are ever more obstacles to Americans' sense

that they are part of a unified and indivisible polity. Election Day is often the culmination of months of intense political divisions. Ideally, it is also the inflection point at which Americans leave their tribal corners. Some celebrate. Others lick their wounds. But, at its best, Election Day is the beginning of the end of the rancor and a time for a unified look towards the future. This Court has explicitly recognized the government's interest in preserving this form of national unity. *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014) (rejecting challenge to prayer at legislative sessions and holding that such prayer "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society").

The voting process is a crucial component of this unity and healing. On Election Day, every citizen who votes in person—irrespective of race, religion, wealth, or political ideology—stands with other citizens at the polls and is afforded an equal say in her government. Minnesota has an interest in ensuring that the several minutes that each voter spends at her polling site, consistent with her country's proud tradition of democratic self-governance, unite her not only with those who share her political beliefs, but also with those who oppose them. Even if the voter's preferred candidate loses, she knows that disappointing result reflects the collective judgment of her fellow citizens, next to whom she had just waited to cast her ballot. The State may permissibly act to protect polling places as celebratory of our democratic system, rather than any particular political party, group, or opinion on a divisive issue. Minnesota has a compelling

interest in safeguarding this element of Election Day, as opposed to allowing the polling place to become yet another site of tension, acrimony, and tribal self-segregation.

Finally, states have a compelling interest in ensuring that poll watchers[2] and poll workers do not engage in discrimination due to conscious or subconscious bias. Minnesota's restriction on political paraphernalia inside the polling place serves as an important prophylaxis in this effort.

Permitting voters to display their political preferences at the polls enables poll watchers to

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[2] While Minnesota does not allow poll watchers *per se*, it does allow party-appointed (in partisan elections) or candidate-appointed (in non-partisan elections) "challengers of voters" to be present at voting precincts. Minn. Stat. § 204C.07(1)-(2). Other states have less restrictive poll-watching regulations, leading many to raise alarms about potential malfeasance by partisan poll watchers. *See, e.g.*, Jocelyn Benson, *When Poll-Watching Crosses the Line*, Politico (Aug. 25, 2016), https://www.politico.com/magazine/story/2016/08/poll-election-monitor-challengers-vote-laws-watchers-214189; Patrick G. Lee, *Trump's Call for a Flood of Poll Watchers Could Disrupt Some Voting Places*, ProPublica (Sept. 14, 2016), https://www.propublica.org/article/trumps-call-for-a-flood-of-poll-watchers-could-disrupt-some-voting-places; Ben Rosen, *Why Trump Wants His Supporters to Monitor the Polls in 'Certain Areas'*, Christian Sci. Monitor (Oct. 2, 2016), https://www.csmonitor.com/USA/Politics/2016/1002/Why-Trump-wants-his-supporters-to-monitor-the-polls-in-certain-areas; Editorial, *Who Watches the Poll Watchers?*, Balt. Sun (Oct. 9, 2016), http://www.baltimoresun.com/news/opinion/editorial/bs-ed-poll-observers-20161009-story.html.

determine far more easily how a voter intends to vote. If the voter wears a button that signals she is going to vote the "right" way, in the poll watcher's eyes, her voting credentials might receive less scrutiny. If, however, she wears a shirt that conveys the "wrong" choice, the poll watcher might challenge her credentials. Discrimination by poll watchers could affect not only the voter who wears the "wrong" garb, but also the voter who prefers not to signal her preferences. If the people around her wear buttons or shirts emblazoned with the "right" political messaging and she does not, a partisan poll watcher might view her suspiciously and err on the side of challenging her credentials.

Functionally, this scrutiny might disenfranchise voters without legal cause. In many states, poll workers who challenge a voter's credentials need not substantiate their claims. *See* Nicolas Riley, *Voter Challenges*, Brennan Ctr. for Justice 15-16 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf. In fact, a challenge will often place the burden on the voter to prove her credentials. *Id.* In some cases, the voter may not be able to provide the necessary documentation in the time she has set aside to vote. In other cases, the voter may deem the process more trouble than it is worth and choose not to vote. These challenges also cause voting delays for everyone, which may lead some to leave the line before voting. *See, e.g.*, Erick Trickey, *How Hostile Poll-Watchers Could Hand Pennsylvania to Trump*, Politico (Oct. 2, 2016), https://www.politico.com/magazine/story/2016/09/2016-election-pennsylvania-polls-voters-trump-clinton-214297 (recounting how aggressive voter challenges

led to long voting delays in some precincts in 2004). In any of these instances, qualified, registered, and desirous voters are functionally disenfranchised. Minnesota's regulation of political paraphernalia in polling places therefore furthers its compelling interests in protecting voters from discrimination and promoting efficient election administration. "The principal object of [the secret ballot] is to enable the elector to express his opinion . . . without being subject to be overawed, or to any ill will or persecution on account of his vote . . . ." *Temple v. Mead*, 4 Vt. 535, 541 (Vt. 1832). The State's interest in preventing disenfranchisement through "overaw[ing]" or "ill will" by poll watchers goes to the core of the "narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right. . . . for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote." *Burson*, 504 U.S. at 213-14 (Kennedy, J., concurring) (citation omitted).

In addition to helping prevent discrimination by poll watchers, restricting political paraphernalia in the polling place is an important prophylaxis against subconscious poll worker discrimination. Minnesota, like many states, hires private citizens to serve as poll workers. *See* Office of Minn. Sec'y of State, *Become an Election Judge*, http://www.sos.state.mn.us/elections-voting/get-involved/become-an-election-judge (last visited Feb. 8, 2018). These poll workers, like anyone else, may have deep political convictions. Absent a ban on political paraphernalia, these workers might unintentionally exhibit unconscious bias against voters who wear the "wrong" paraphernalia. For

example, when verifying whether voters' signatures match the voter registration database, a poll worker might unknowingly scrutinize voters differently based on the tribal affiliations the voters signal. The poll worker might subconsciously view a voter with the "right" political button as legitimate and properly credentialed; that voter's signature might receive a cursory glance. The signature of a voter with the "wrong" political t-shirt or without a discernible political signal, however, might face a more stringent inspection. Even relatively muted discrimination is problematic. A voter should be free from *any* type of pressure at the polling place, even if that pressure is as subtle as greeting a stone-faced clerk who had smiled widely at others wearing the "right" paraphernalia. *Cf. Burson*, 504 U.S. at 206-07 (plurality op.) ("Intimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections."). This, too, can be disenfranchising or intimidating and states have compelling reasons to prevent it by restricting political paraphernalia in the polling place.

II. Any Burdens on Speakers Are Exceedingly Minimal.

Any burden on speakers from complying with Minnesota's law is exceedingly minimal. Unlike the law at issue in *Burson*, which implicated the "quintessential public forums" of streets and sidewalks, *id.* at 196 (plurality op.), Minnesota's law is directed to polling places, which are not traditional speech forums. On the contrary, "restrictions on speech around polling places on election day are as venerable a part of the American tradition as the

secret ballot." *Id.* at 214 (Scalia, J., concurring); *cf. PG Publ'g Co. v. Aichele*, 705 F.3d 91, 113 (3d Cir. 2013) ("[A] polling place is a nonpublic forum . . . ."); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 749 (6th Cir. 2004) ("By opening up portions of school and private property for use as polling places on election day, Ohio has not opened up a nontraditional forum for public discourse."); *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001) ("[T]he interior of a polling place, is neither a traditional public forum nor a government-designated one.").

Nor are polling places the type of public forums opened by government designation to general public expression, *see, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), since the "only expressive activity involved is each voter's communication of his own elective choice," conveyed privately through secret ballot. *Marlin*, 236 F.3d at 719. A state "does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse," *Cornelius*, 473 U.S. at 802. It is certainly not the case here that Minnesota intentionally opened its polling places as forums for open public discourse. Finally, because polling places are clearly demarcated as such, there is no serious concern of insufficient "indication . . . to persons . . . that they have entered some special type of enclave." *United States v. Grace*, 461 U.S. 171, 180 (1983).

The First Amendment permits Minnesota to impose reasonable restrictions on expressive activity in this non-public forum, and such restrictions "need only be *reasonable;* [they] need not be the most

reasonable or the only reasonable limitation[s]." *Cornelius*, 473 U.S. at 808. The fact that Minnesota's restriction extends to non-verbal expression does not alter that standard. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828, 831 (1976) (upholding army base regulation prohibiting "posting" without "prior written approval" of, *inter alia*, "handbills, flyers, circulars, pamphlets or other writings, . . . prepared by any person"); *Hodge v. Talkin*, 799 F.3d 1145, 1162 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016) (upholding 40 U.S.C. § 6135, which bans on Supreme Court grounds, *inter alia*, "a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement"). Given Minnesota's strong interests in protecting the integrity of its elections and the free choice of its voters, as discussed above, its restriction on non-verbal expression certainly passes constitutional muster as a reasonable means of achieving those goals.

Moreover, the regulation at issue here presents only a minor burden. In Minnesota, the average voter waits approximately six to eight minutes to vote. *See* Gov't Accountability Office, *Observations on Wait Times for Voters on Election Day 2012*, at 88 (2014); Philip Bump, *Planning to Vote? Here's How Long You Could Wait*, Wash. Post (Nov. 3, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/11/03/planning-to-vote-tomorrow-it-should-take-15-minutes/?utm_term=.bab36b85e8b7; Anand Katakam, *Map: How Long Does Voting Take in Your State?*, Vox (Oct. 9, 2014), https://www.vox.com/2014/10/9/6951251/map-voting-time-by-state. It is hardly burdensome to remove a button or to cover a shirt with outerwear for several minutes. Until a

voter enters a polling place, and as soon as she leaves the protected zone around it, she is free to stand on the sidewalk—which *is* a traditional public forum—with the button attached to her lapel or the t-shirt visible for all to see. *See Hodge*, 799 F.3d at 1169 ("[I]t is a mark in favor of the statute's reasonableness that the barred activity can be undertaken in an adjacent forum—the sidewalk running along First Street Northeast."). She is free to march up and down Main Street with signs urging that others vote a certain way. She is free to spend the day making phone calls on behalf of her preferred candidate or volunteering to knock on doors or drive voters to the polls. For perhaps 23 hours and 52 minutes of Election Day, she may proselytize as she wishes. The provision at issue here merely furthers Minnesota's compelling interest in protecting the integrity and order of its elections for the approximately eight minutes that she spends at the polling place. Restricting the wearing of political paraphernalia during this short time in one small area is an insubstantial burden.

III. The Possibility of Unconstitutional Applications of the Statute Does Not Justify Holding It Facially Overbroad.

The hypothetical possibility of unconstitutional applications of Minnesota's electioneering statute does not justify holding it facially overbroad. "[T]o prevail in a facial challenge, . . . it is not enough for a plaintiff to show 'some' overbreadth. Rather, the overbreadth of statute must not only be real, but substantial as well." *Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002) (quotation marks and citation omitted) (bracket in original). This Court has "vigorously enforced the requirement that a statute's overbreadth

be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292. And in determining the scope of a statute's potential overbreadth, the Court must be guided by the statute's realistic reach: "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449-50.

Petitioners no longer challenge the application of Minnesota's statute to the items they *actually wore* in the voting booths in 2010—the "Please I.D. Me" buttons and the Tea Party shirt. Rather, they and their supporting *amici* imagine a host of cases they say would impermissibly fall within the statute's scope. Petitioners wonder whether the United States flag would violate the statute. Pets.' Br. at 27. *Amici* ACLU *et al.* posit that "wearing a Colin Kaepernick jersey or t-shirts depicting pictures of Andrew Jackson, Bob Dylan, [or] Beyoncé" could run afoul. ACLU Br. at 14. *Amicus* the Goldwater Institute offers a "#MeToo" shirt, or "a picture of a marijuana leaf." Goldwater Br. at 23.

But these imagined scenarios do not arise from the face of the statute: none of these items involves political insignia. Nor have any of these hypotheticals ever actually triggered the law. And even if such examples did fall within the ambit of the statute—which is not at all obvious—the law is not overbroad merely because one can identify specific potential applications that exceed the scope of the State's legitimate regulatory interests. Rather, the question is whether such applications are *substantial* when

compared to the law's legitimate reach. They are not.

The legitimate reach of Minnesota's statute is significant. There is no dispute that it legitimately prohibits all campaign-related political badges, buttons, and insignia in polling places—the most obvious (and likely the largest) category of political buttons someone seeking to influence voters would wear in a polling place. There is also no dispute that the statute may constitutionally be applied to non-campaign political badges, buttons, and insignia that could threaten, intimidate, or confuse voters. Take, for example, the "Please I.D. Me" buttons that motivated this case. As respondents note, these buttons are not only intended to influence voters' choices, but they are also likely to foster voter intimidation or confusion. Resps.' Br. at 46-47. This is especially so in Minnesota, where voters rejected a ballot measure seeking to impose a photo ID requirement. Moreover, consider shirts displaying the names of groups with recognizable political views such as the KKK, or an image of a swastika. Surely, Minnesota has an interest in preventing voters from enduring the intimidation and polling-place chaos that such messages would engender. These many applications directly advance Minnesota's legitimate interest in order, peace, and decorum at polling places.

In contrast to these plainly legitimate applications of the provision, petitioners offer the strained hypotheticals noted above. Those hypotheticals cast no doubt on the facial validity of the provision, which is the only issue before the Court. *See* Petition for Writ of Certiorari, Question Presented. If Minnesota were to declare that it planned to enforce its law by barring blue shirts or by

requiring voters to cover up American flag lapel pins in the voter booth, then the statute might well be subject to an as-applied challenge. But the *real* (not imagined) applications of Minnesota's law in the record do not come close to warranting a "last resort" application of the overbreadth doctrine's "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Moreover, even if this Court concludes that the statute could sweep too far (which it does not), the appropriate response would be to adopt a limiting construction rather than invalidate it, particularly in light of its important, legitimate reach. "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Any such limiting construction must preserve the State's constitutional ability to apply its statute to disruptive messages such as the "Please I.D. Me" buttons, and those meant to confuse or intimidate voters. Likewise, it must preserve the ability to prohibit buttons related to candidates, parties, and the like. To the extent a limiting construction is needed, it could be achieved by construing the statutory prohibition on "political badges, buttons, and insignia," Minn. Stat. § 211B.11, as not reaching the last category of the County's Election Day policy—insignia of groups with "recognizable political views," *see* Pet. App. I-2—except to the extent such insignia also fall within the other prongs of the policy, such as by affecting the voting process. The text of the statute could support

such a construction under the theory that apparel referring only to groups such as the Chamber of Commerce or Planned Parenthood are not, without more, "political insignia" for purposes of the statute.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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IN THE

Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL.,
Petitioners,

v.

JOE MANSKY, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR CATO INSTITUTE, RUTHERFORD INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Minn. Stat. § 211B.11, which prohibits all "political" garb at the polling place, is facially unconstitutional because no conceivable governmental interest could justify such an absolute ban on this most highly protected form of speech.

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INTEREST OF THE *AMICI CURIAE*[1]

The **Cato Institute** is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The **Rutherford Institute** is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

Reason Foundation is a nonpartisan 501(c)(3) organization. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Founded in 1978, Reason publishes *Reason* magazine and commentary on its website, reason.com, and issues policy research reports. Reason's personnel consult with public officials on the national, state, and local level. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a

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[1] Rule 37 statement: No party's counsel authored any part of this brief and no person other than *amici* funded its preparation and submission. Both parties filed blanket consent.

serious threat to freedom of speech, and therefore contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The **Individual Rights Foundation** ("IRF") is the legal arm of the David Horowitz Freedom Center ("DHFC"), a nonprofit 501(c)(3) organization (formerly the Center for the Study of Popular Culture). DHFC's mission is to promote the core principles of free societies—and to defend America's free society—by educating the public to preserve traditional constitutional values of individual freedom, the rule of law, and limited government. IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights. In support of this mission, IRF litigates and participates as *amicus* in cases that raise significant First Amendment speech and issues.

This case concerns *amici* because the fundamental constitutional guarantee of free speech protects voters' rights to express themselves in the polling place through non-disruptive political speech. Minnesota's absolute ban on any form of political speech at the polls threatens First Amendment freedoms.

INTRODUCTION AND SUMMARY OF ARGUMENT

Political speech, especially speech critical of the government, individual politicians, and political ideas, is essential to the continued viability of the democratic process. That's why this Court's First Amendment jurisprudence gives special protection to core political speech. Yet Minnesota has specifically targeted such

speech, flatly banning all "political" badges, buttons, and insignia within every polling place in the state. This targeting alone requires strict judicial scrutiny.

Minnesota's absolute ban on political insignia fails that judicial review. Whatever interest the state may have in preventing confusion or improper influence is not furthered by a complete ban on political speech. Moreover, without qualification, the idea of political speech as an "improper influence" is foreign to the First Amendment. Minnesota's law is thus not narrowly tailored to any compelling state interest. Further, the ban on *all* political speech is facially overbroad. It places enormous discretion in unaccountable election judges to define "political" speech and thus chills the personal expression of every voter. This Court should ensure that the Eighth Circuit's lax protection of core political speech does not stand.

ARGUMENT

I. A COMPLETE BAN ON POLITICAL EXPRESSION WARRANTS STRICT SCRUTINY, REGARDLESS OF THE FORUM

When the government restricts expressive activity on its own property, this Court uses a difficult-to-apply set of tools often referred to as "forum analysis." Forum analysis categorizes the physical location where the expressive activity takes place as either a "traditional public forum," a "designated public forum," a "limited public forum," or a "nonpublic forum." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467–70 (2009). The degree of protection afforded to speech varies depending on the category of the forum. *Id.*

Rigidly applying this forum analysis, the Eighth Circuit held that the polling place is a nonpublic forum and that strict scrutiny does not apply. Pet. App. A-5; D-7–8. But such a formulaic application of the forum analysis framework can sometimes fail to adequately protect important First Amendment interests. As this Court has acknowledged, looking only at the location covered by a speech ban may fail to consider the extent of the speech interests at stake.

In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984), this Court warned of the "limited utility" of focusing only "on whether the tangible property [where speech is restricted] should be deemed a public forum." Although the traditional forum analysis generally provides a workable analytical tool, "the analytical line between a regulation of the 'time, place, and manner' in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges." *Id.* (quoting *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981)). In other words, focusing on the *location* of a speech ban and not on the *operation* of that ban fails to put the ban in its full context. When courts inflexibly apply a categorical version of forum analysis, they can distract themselves from giving speech the protection it deserves.

Here, the normal forum analysis has proven inadequate. The Eighth Circuit, after finding that the polling place is a nonpublic forum, held that the speech ban need only be viewpoint-neutral to pass constitutional scrutiny. Pet. App. D-8. But as this Court's precedents have shown, even regulations that are facially

viewpoint neutral can sometimes have startlingly wide breadth. In such a situation, the Court has applied a level of scrutiny on par with that applied to speech regulations that discriminate based on viewpoint.

In *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), this Court declared unconstitutional a city ordinance that prohibited property owners from displaying any signs except "residence identification" signs, "for sale" signs, and signs warning of safety hazards. *Id.* at 45. In affirming the lower court, this Court noted a "particular concern" with laws that invalidated an entire medium of expression. *Id.* at 55. As the Court explained, even viewpoint neutrality cannot save speech restrictions of such a broad scope. Even though "prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination," the Court recognized that "the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* As *City of Ladue* shows, sweeping restrictions on speech, particularly political speech, require courts to set aside the traditional viewpoint-versus-content distinction. A categorical approach is inappropriate because it fails to protect core speech rights.[2]

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[2] "'[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others . . . . To ensure 'the widest possible dissemination of information[,]' and the 'unfettered interchange of ideas,' the First Amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression.'" *Gilleo*, 512 U.S at 55 n.13. (quoting Geoffrey R. Stone, *Content-Neutral Distinctions*, 54 U. Chi. L. Rev. 46, 57–58 (1987)) (internal citations omitted).

The restrictions found in Minnesota's polling-place regulation represent just such a sweeping prohibition of core First Amendment speech. The law completely bans a loosely defined genre of speech in all wearable means of expression. If ever there were a regulation that threatened "the widest possible dissemination of information" and the "unfettered interchange of ideas," it is this one. *Gilleo*, 512 U.S. at 55 n.13.

Further, strict scrutiny is warranted because Minnesota's law explicitly targets political speech. This Court strongly protects "core political speech" as "occup[ying] the highest, most protected position" in the hierarchy of constitutionally protected speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). *See also Burson v. Freeman*, 504 U.S. 191, 217 (1992) ("The statute directly regulates political expression and thus implicates a core concern of the First Amendment."). This protection has been the same whether such speech is oral or, as here, takes the form of printed symbols and slogans. The Court has defined political speech broadly to include all "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

This Court has frequently applied strict scrutiny to political-speech bans, regardless of the forum affected. For example, when confronted with a law that would have restricted all anonymous leafleting in opposition to a proposed tax, the Court noted the importance of specifically protecting such political speech:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.

> The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346–47 (1995) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

More recently, the Court reaffirmed that laws burdening political speech are subject to strict scrutiny. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court invalidated a federal statute that barred certain independent expenditures for electioneering communications. Highlighting the primacy of political speech, the Court noted that "political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* at 340 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

With this history in mind, there is little doubt that Minnesota's polling-place restriction is hostile to the protection that this Court has traditionally afforded core political speech. By eliminating virtually all means of political expression in or around the polling place, the statute cuts off the "unfettered interchange of ideas" in an important place for individual political expression. *McIntyre*, 514 U.S. at 346–47. By failing to apply strict scrutiny, the Eighth Circuit decision ignored the unique disfavor this Court gives to blanket

bans on political expression. Such a ruling dangerously narrows First Amendment protections for political expression, requiring this Court to clarify that strict scrutiny should have been applied.

II. MINNESOTA'S BAN ON POLITICAL EXPRESSION CANNOT SURVIVE STRICT SCRUTINY

In *Burson v. Freeman*, this Court upheld a content-based restriction on political campaign speech in the sidewalks and streets surrounding a polling place, which were indisputably a public forum. *Burson*, 504 U.S. at 211. Although the Court found that the particular statute at issue was narrowly drawn to serve a compelling state interest, it also cautioned that its holding was narrow, representing the rare case where a facially content-based law survived strict scrutiny. *Id.* at 211. For several reasons, Minnesota's speech ban is distinguishable from the law in *Burson*. This is not the "rare case" that withstands strict scrutiny.

A. Minnesota Has Not Presented a Compelling State Interest for Banning All Political Expression

When confronted with a statute restricting a fundamental right, this Court must first ensure that a compelling government interest has been articulated. If a statute's stated or implied interest is not sufficiently compelling, that statute must be struck down. For example, in *Republican Party of Minnesota v. White*, 536 U.S. 765, 777–79 (2002), the Court rejected Minnesota's stated interests of "preserving the impartiality of the state judiciary" and "preserving the appearance of the impartiality of the state judiciary."

Such interests were insufficiently compelling to support a law banning candidates for judicial election from announcing their views on disputed issues.

Here, Minnesota has failed entirely to provide a compelling state interest for its political speech ban. Although the state suggested during this litigation that the compelling interest supporting Minn. Stat. § 211B.11 is the same as the one accepted in *Burson*, a close reading of the statute shows that this cannot be the case. The Eighth Circuit erred in uncritically accepting this argument. *See* Pet. App. A-5; D-8.

In *Burson*, this Court determined that the ban on campaign speech served two government interests. First, it accepted the state's argument that the statute served the interest of allowing citizens to vote freely for their candidate of choice. *Burson*, 504 U.S. at 198. Second, it likewise accepted the claim that the statute ensured the integrity and reliability of the election process. *Id.* The Court's analysis, however, was largely based on a unique historical circumstance: the long history of bribery, intentional confusion, and intimidation at polling locations during the Colonial period. That history explains why states had for centuries enacted legislation aimed at "battl[ing] against two evils: voter intimidation and election fraud." *Id.* at 206. Given that history, the Court concluded Tennessee had a "compelling interest in protecting voters from confusion and undue influence," and in "preserving the integrity of its electoral process." *Id.* at 199. As discussed *infra*, while the state has an interest in preventing voter intimidation and "undue influence," properly and narrowly defined, it does not have a compelling interest in protecting voters from "influence."

Voter intimidation might be a species of "undue influence," but Minn. Stat. § 211B.11 cuts more broadly than that, prohibiting the wearing of "[a] political badge, political button, or other political insignia . . . at or about the polling place on primary election day." Thus, it differs starkly in both scope and objective from the *Burson* statute. Moreover, by defining "political" as "[i]ssue oriented material designed to influence or impact voting," Minnesota's law bans the very speech the First Amendment protects most stringently. It does not specifically target solicitation and "undue" influence, nor does it mention confusion or intimidation.[3]

This statutory silence is damning. *Every* aspect of a political-speech ban must be justified by a compelling interest. By failing to state an intent to target intimidation or actual undue influence, Minnesota has failed in its burden of showing that every speech restriction in the statute furthers a specific and compelling end. For this reason alone, the statute fails strict scrutiny.

B. Minnesota's Ban on Political Expression Is Not Narrowly Tailored to Achieve Any Government Purpose

Even if this Court were to find that Minnesota had put forward a sufficiently valid government interest, the statute still is not narrowly tailored to meet that interest while minimally affecting the speech interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). To be narrowly tailored, a speech

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[3] Indeed, by evaluating the first and third sentences of the statute separately, the Eighth Circuit tacitly acknowledged that the scope and purpose of the government interests differ between the two sentences. *Compare* Pet. App. D-6–7 *with id.* at D-7–10.

ban "must be the 'least restrictive means among available, effective alternatives.'" *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

Minnesota's ban does not come close to meeting this standard, being both overinclusive and underinclusive. It is overinclusive because it bans political speech that does not meaningfully frustrate the objectives of ensuring electoral integrity and preventing voter confusion. It is underinclusive because it allows speech in the polling place that could create voter confusion or intimidation so long as that speech is not "political."

1. The ban is overinclusive because it disallows even innocuous political speech.

Minn. Stat. § 211B.11 is fatally overinclusive. The statute prohibits any insignia deemed to be "political"—as determined solely at the discretion of the on-site election judges. A hat or shirt bearing nothing more than the words "Occupy" or "Tea Party," or even a picture of a blue donkey or red elephant, would fall afoul of the ban. Yet such clothing is part of the normal tableau of public life; no reasonable voter would interpret such garb as an attempt to intimidate or cajole.

Additionally, the statute gives election judges the power to ban any materials "promoting a group with recognizable political views." Pet. App. I-1–2. Local union badges, national flag buttons, or even pins indicating support for the Catholic Church[4] could all run afoul of this provision. But banning such expression is unlikely to further any legitimate government interest.

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[4] The Catholic Church has an episcopal jurisdiction, The Holy See, which is responsible for diplomatic and political decisions.

As the dissent explained in this case's first trip to the Eighth Circuit, it is hard to believe

> that the presence of a passive and peaceful voter who happens to wear a shirt displaying, for example, the words "American Legion," "Veterans of Foreign Wars," "AFL–CIO," "NRA," "NAACP," or the logo of one of these organizations (all of which have actively participated in the political process) somehow causes a disruption in the polling place or confuses or unduly influences voters.

Pet. App. D-18 n.7.

It is telling that this Court has never found an absolute bar on all political expression to be necessary to further a government interest. *See, e.g., Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). Even if preventing polling-place solicitation is a compelling government interest, Minnesota's speech ban is not narrowly tailored to address that interest and so fails strict scrutiny.

2. The ban is fatally underinclusive.

In addition to analyzing whether a law prohibits *too much* speech, tailoring analysis considers whether it *fails* to restrict speech that is just as harmful to the purported governmental interest. *See, e.g., Citizens United*, 558 U.S. at 362 (striking down a statute barring independent expenditures for electioneering communications because it barred corporate speech in only select media and only for a 30-to-60-day period before an election); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011) (invalidating as "wildly underinclusive" a state statute that imposed restrictions on

the sale of "violent video games" to minors because it still allowed purchases if parents approved).

Minn. Stat. § 211B.11 suffers from an unconstitutional degree of underinclusion. By targeting only "political" speech, it leaves non-political forms of persuasive or confusing speech entirely unregulated. For example, the statute apparently does not stop individuals from wearing buttons or shirts describing the futility of voting or advertising P.J. O'Rourke's book, *Don't Vote: It Just Encourages the Bastards* (2010).

The statute also has a purported goal of "maintain[ing] peace, order, and decorum" in the polling place. Pet. App. A-5; D-8. Even if we accept the dubious proposition that someone could start a fight by wearing a button, surely there are as many non-political statements that would do the trick as political ones. Yet the statute leaves entirely unregulated most non-political expression, even if it would be much more likely to undermine peace, order, and decorum.

Minnesota's speech ban is thus not narrowly tailored to serve any legitimate state interest. By failing to achieve a proper "fit" between what it seeks to achieve and what it actually regulates, the law leaves unregulated speech that would likely contribute to polling-place confusion, while restricting speech that has no appreciable effect on voters' decision-making.

III. THE FIRST AMENDMENT PROTECTS THE RIGHT OF SPEAKERS TO INFLUENCE VOTERS, SO CREATING AN "INFLUENCE-FREE" POLLING PLACE IS NOT A COMPELLING STATE INTEREST

Minnesota's law broadly prohibits any material "designed to influence and impact voting," or "promoting a group with recognizable political views," even when the apparel makes no reference to any issue or candidate on the ballot. Pet. App. I-1–2. The Eighth Circuit ruled that, even if "apparel is not election-related, it is not unreasonable to prohibit it in a polling place . . . [i]n order to ensure a neutral, influence-free polling place." *Minnesota Majority v. Mansky*, 849 F.3d 749, 752 (8th Cir. 2017) (referring to Tea Party apparel). The lower court's analysis turned the First Amendment on its head, so this Court should make clear that creating "influence-free" spaces is not a compelling interest under the First Amendment. Influencing voters is a constitutional virtue, not a harm.

Attempting to influence voters is the end of politics; the First Amendment is the means. Minnesota's ban on the passive act of displaying political speech at a polling place is an egregious violation of those means. "'Legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.'" *Meyer v. Grant*, 486 U.S. 414, 428 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 50 (1976). That premise is just as true at polling places as it is one hundred miles away.

"[T]he principle of the freedom of speech springs from the necessities of the program of self-government . . . . It is a deduction from the basic American agreement that public issues shall be decided by universal

suffrage." Alexander Mieklejohn, *Political Freedom* (1960). For democracy to function properly, voters must have access to as much information as possible so they may make the wisest choices at the ballot box. *See* Alexander Mieklejohn, *The First Amendment Is an Absolute*, 1961 Sup Ct. Rev. 245 (1961). Minnesota may not, by way of criminal sanctions, attempt to insulate the electorate from exposure to voices, views, and opinions, which it assumes will influence voters' free and informed choices. This notion is "incompatible with the First Amendment." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 706 (1990) (Kennedy, J., dissenting). Instead, Minnesota should respect the "right of citizens to inquire, to hear, to speak, and to use information to reach consensus." *Citizens United*, 558 U.S. at 339–40. A right which "is a precondition to enlightened self-government and a necessary means to protect it." *Id.*

A. The Vague Invocation of "Undue Influence" Cannot Save Minnesota's Ban

Citing "a compelling interest in 'protecting voters from confusion and undue influence,'" *Mansky*, 849 F.3d at 752, the Eighth Circuit endorsed the idea that some political insignias may "unduly" influence voters at a polling place. *Amici* do not understand how such political influence could be "undue," nor what part of the Constitution permits the government to protect voters from political influence.

More specifically, what is the harm from a voter's being influenced at the polling place? We may hope that voters will form their opinions and cast their ballot based on facts, evidence, logic, and reason well before they arrive at their precinct, but the government cannot command them to do so. People who are swayed

by the appearance of a campaign button or other attire may not be the "ideal voter," but they are entitled to base their voting decisions on whatever they wish. This is not a harm that requires a remedy.

"Undue influence" suggests an improper or overpowering influence which overcomes the free will of a voter. But one voter's donning political garb at or near the polling place possesses no magical power to compel voter behavior. If anything, Minnesota has used *its* overpowering influence to overcome the free will of the voter by restricting the voters' right to free expression and the right to judge for themselves. This Court should be wary of the government's professed capability to determine whether a particular form of political speech is "undue" or unfair. "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983).

Undue influence "may represent no more than [the] convincing weight of [an] argument fully presented, which is the very thing the [First] Amendment and the electoral process it protects [are] intended to bring out." *United States v. CIO*, 335 U.S. 106, 145 (1948) (Rutledge, J., concurring). Whether that speech consists of money spent, persuasive speech uttered, or convincing political apparel worn is irrelevant. The mere fact that a particular argument—or in this case a t-shirt—may have a considerable persuasive effect is not a reasonable basis for Minnesota's ban. In fact, it is the exact opposite: potentially persuasive political speech should receive the highest protection under the First Amendment. *See Citizens United*, 558 U.S. at 382 ("A speaker's ability to persuade...provides no basis for

government regulation of free and open public debate on what the laws should be.").

"The premise of our Bill of Rights . . . is that there are some things . . . that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate." *Austin*, 494 U.S. at 692 (Scalia, J., dissenting). Minnesota's ban is such a restriction. Citizens must be trusted and empowered to think for themselves, free of government intervention which disrespects their intelligence and capacity for reason. "[T]he people are not foolish but intelligent, and will separate the wheat from the chaff." *Id.* at 695. Justice Scalia's reasoning was vindicated in *Citizens United*, in which the Court recognized that "[t]he First Amendment confirms the freedom to think for ourselves." 558 U.S. at 357. When the government uses its power "to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought . . . [t]his is unlawful." *Id.*

Voters must be free to use their own judgment—not that of government officials—to determine which forms of political expression are most convincing and to exercise the franchise accordingly. Minnesota infringes upon the natural truth that "[j]udgment is given to men that they may use it." John Stuart Mill, *On Liberty* (1859). The question is, "[b]ecause [that judgment] may be used erroneously, are men to be told that they ought not to use it at all?" *Id.* The answer is a resounding no. "The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United*, 558 U.S. at 341.

B. Blanket Bans on Political Speech May be Justified to Prevent Actual Intimidation, Confusion, and Chaos—Not Influence

While Minnesota has no compelling interest in preventing voter influence, it does have an interest in preventing voter intimidation and confusion. Such intimidation can take the form of election judges illegally offering interpretations of ballot initiatives, James Nord, *Scattered Polling-Place Disruptions and Problems Reported*, MinnPost (Nov. 6, 2012), http://bit.ly/2Apx3nx, or of unruly poll-watchers asking voters of IDs or misrepresenting their credentials. Jocelyn Benson, *When Poll-Watching Crosses the Line*, Politico (Aug. 25, 2016), http://politi.co/2E5Ro3d. To counter those issues, Minnesota could reasonably restrict soliciting votes, giving speeches, or conducting debates inside the polling place in order to prevent voter intimidation and outright chaos. Without some level of order, calm, and quiet, it would be difficult to verify voter eligibility and for voters to concentrate and decide on their ballot. But "people sometimes invoke a carelessly formulated notion of coercion to justify regulation of behavior, or speech, of which they do not approve." C. Edwin Baker, *The Scope of the First Amendment*, 25 UCLA L. Rev. 964, 999 (1978).

Minnesota's ban is carelessly formulated. The passive acts it restricts do not cause any chaos. Nor do they intimidate or coerce—even if the apparel or insignias directly advocate for the election or defeat of a specific candidate or ballot initiative. "The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd." *Burson v. Freeman*, 504 U.S. 191, 218-19 (1992) (Stevens, J., dissenting)

(referring to "the simple 'display of campaign posters, signs, or other campaign materials'"). The ban "does not concern aggressive, disruptive action or even group demonstrations." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (holding that banning and punishing students for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance violates the First Amendment).

Minnesota seeks to prevent harms which are not even caused by the free expression the law restricts. "[S]peech harms occur only to the extent people 'mentally' adopt perceptions or attitudes." Baker, *supra*, at 998. By assuming that voters cannot handle the sight of a political button or a shirt bearing a candidate's name, Minnesota violates the autonomy of its citizens. "[R]especting the listener's integrity as an individual normally requires holding the listener responsible for her conduct unless she has been coerced or forced into the activity." *Id.* The fact that Minnesota's restriction applies in the unique location that is the polling place on election-day does not save it from the strictures of the First Amendment. "Tradition notwithstanding, the State does not have a legitimate interest in insulating voters from election-day campaigning." *Burson*, 504 U.S. at 227 (Stevens, J., dissenting) (citing *Mills v. Alabama*, 384 U.S. 214 (1966)).

IV. THE FIRST AMENDMENT PROTECTS SELF-EXPRESSION QUA SELF-EXPRESSION, AND POLITICAL APPAREL IS A FORM OF SELF-EXPRESSION

By preoccupying itself with concerns of undue influence and attempts to communicate political messages, Minnesota ignores the importance of individual

autonomy, self-expression, and tolerance inherent in the First Amendment. "The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity." *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

Individuals wear specific clothing in an effort to define themselves to the world. C. Edwin Baker refers to the Vietnam War protestor who shouts about stopping the war not to "communicate anything to people in power," but to "*define* herself publicly in opposition to the war." Baker, *supra*, at 994. The students who wore black armbands in opposition to the Vietnam War did the same. *See, e.g.*, *Tinker*, 393 U.S. 503. The mere fact that the sight of one of those armbands may inspire reaction from those who disagree with its message was not enough to support banning expression. This was because "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. That freedom is the "basis of our national strength." *Id.*

Minnesota's ban could reasonably be interpreted to include clothing with rainbow symbols worn by LGBT voters who refuse to hide in the closet, flag pins worn by patriotic voters who cherish their military service, or crosses worn by religious voters who find strength in their faith. Many voters wear these things not to influence or intimidate others, but to claim membership in a group and assert their identity. They seek only to exercise their right to freedom of expression. A right that "is justified first of all as the right of an individual purely in his capacity as an individual . . . [and that]

derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 879 (1963). By restricting the freedom of speech and expression, Minnesota violates that premise, invades voters' autonomy, and degrades their self-worth.

The ban also denies citizens' capacity for tolerance of differing views. We live in "a large and complex society, with people of varied beliefs and interests. Providing some accommodation of these varied beliefs is a critical and basic task of the society." Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 Colum. L. Rev. 979, 984 (1990). Allowing for the passive wearing of clothing and accessories with a political message promotes this basic task. "In this sense, free speech may simply function as a zone of extreme toleration...because as a practical matter living with divergent behavior is necessary." *Id.* Minnesota's ban is the type that prevents "people from engaging in substantively valued behavior," and which "drastically limit[s] the possibility of popular participation in change." Baker, *supra*, at 1016. That participation in change is what our elections are all about. For these reasons, the Court should invalidate Minnesota's ban. Limits on direct advocacy or political messages in or about the polling place—in passive form without intimidation, disturbance, or confusion—should be deemed unconstitutional.

CONCLUSION

For the reasons set forth above, *amici* ask the Court to strike down Minnesota's unconstitutional ban on all "political" speech within the polling place.

Respectfully submitted,

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In The
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, et al.,

Petitioners,

v.

JOE MANSKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Minnesota election law forbids voters from wearing political badges, political buttons, or other political insignia at the polling place. *See* Minn. Stat. § 211B.11. The ban broadly prohibits any material "designed to influence and impact voting," or "promoting a group with recognizable political views," even when the apparel makes no reference to any issue or candidate on the ballot.

The Eighth Circuit, aligned with the Fifth and D.C. Circuits, invoked *Burson v. Freeman*, 504 U.S. 191 (1992), to hold that a state can impose a "speech-free zone" without infringing on the Free Speech Clause of the First Amendment. There is deep tension between those decisions and the reasoning in decisions of the Fourth and Seventh Circuits, which hold that the First Amendment does not allow a state to prohibit all political speech.

The question presented is: Is Minnesota Statute Section 211B.11, which broadly bans all political apparel at the polling place, facially overbroad under the First Amendment?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") was established 30 years ago as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are directly implicated.

GI devotes substantial resources to defending the vital constitutional principle of free speech. Specifically relevant here, GI attorneys successfully represented citizens challenging bans on speech at polling places in *Reed v. Purcell*, No. CV 10-2324-PHX-JAT, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010), and *Wickberg v. Owens*, No. 3:10-cv-08177-JAT (D. Ariz. filed Sept. 20, 2010). GI has also litigated and won important victories for other aspects of free speech, including *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012); *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016), and has appeared

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[1] Pursuant to Supreme Court Rule 37(6), counsel for amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than amicus, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. Blanket consent for the filing of amicus brief has been granted by all parties.

frequently as amicus curiae in this and other courts in free speech cases. *See, e.g.*, *Janus v. AFSCME* (No. 16-1466, pending); *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 480 (2015).

Goldwater Institute scholars have also published extensively on the importance of free speech in various contexts, particularly involving regulations of "electioneering" or campaign finance restrictions that violate free speech rights. *See, e.g.*, Jon Riches, *An Informed Citizenry: Broadening the "Media Exemption" to Include Nonprofit Communications* (Goldwater Inst. July 13, 2017);[2] Stanley Kurtz, *et al., Campus Free Speech: A Legislative Proposal* (Goldwater Inst., 2017).[3] Amicus believes its litigation experience and policy expertise will aid this Court in consideration of this case.

SUMMARY OF ARGUMENT

The state has a legitimate interest in maintaining order and decorum in the polling place. That can and should be accomplished by enforcing prohibitions on disruptions, assaults, and other ordinary torts and crimes. It should not be accomplished by restrictions on non-disruptive speech—let alone by the broad

[2] https://s3.amazonaws.com/licensure/An+Informed+Citizenry+w+Imagery+FINAL+.pdf.

[3] http://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf.

category of speech prohibited here: speech that might "persuade a voter." M.S.A. § 211B.11.

What this Court should *not* do is authorize the state to pursue the illegitimate interest that has become commonplace today: the effort to cleanse the realm of political expression of allegedly improper "influence" in order to obtain the "unbiased," "real" will of the people. *Cf. Arizona Free Enter. Club*, 564 U.S. at 749 (rejecting efforts to "level the playing field" as illegitimate). Other examples of laws that aim at that illegitimate purpose are disclosure mandates that force donors to nonprofit groups to provide their names, addresses, and even employers' identities, to the public whenever they support think tanks or political causes, *see, e.g.*, *Colorado Union of Taxpayers v. Denver* (Denver Cnty. 2d Jud. Dist., No. 2017-CV-034617, filed Dec. 13, 2017); *Center for Competitive Politics*, 784 F.3d 1307—or laws that forbid people from donating to political campaigns as they wish. *See, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

Such restrictions on free expression all rest on the erroneous premise that if only "improper" political influences were eliminated, democracy would reach the "right" result—the true will of the people, without bias. But this idea is wrongheaded. It is not possible to draw a principled distinction between speech that can be allowed to influence the public and speech that should not be. And any efforts to draw such a line invite biased enforcement and unconstitutional restrictions on free speech.

That faulty idea depends, in turn, on a misguided idea of what the First Amendment is designed to do—namely, the notion, now common in the legal community, that it exists to serve the purposes of *society as a whole* rather than to protect the freedom of *individual speakers*. That is an untenable notion, contrary to our constitutional tradition, which ultimately leads to irresolvable legal problems. It downplays the essential importance of individual conscience—which is the liberty the First Amendment aims to secure. And it leads to the conclusion that government can censor some individuals if (in the opinion of political leaders) doing so is good for society.

This Court should take this opportunity to make clear that the purpose of freedom of speech is *not* primarily to serve broad social goals, but to protect individuals in their expressive rights for *those individuals'* sake.

The relevance of these principles is plain when one considers the obvious point raised by the dissent in this case: the Minnesota statute goes far beyond preventing disruptions in the polling place. *See* Pet. App. D-18 n.7 (Shepherd, J., dissenting). It bans all speech that is categorized—according to vague criteria enforced by inadequately trained personnel—as "political," even if that speech does not relate to any issue or candidate on the ballot. Such a ban is actually *more* likely to lead to disruption and delay—as the facts in this case demonstrate—because it requires polling place workers to monitor voters' clothing and order them to remove buttons or cover their shirts, or to go

home. Such a ban also encourages voters themselves to monitor each other's behavior instead of minding their own business. All of this is *more* likely to provoke confrontations than simply letting a voter wear a button when she goes into the voting booth. Certainly the government cannot censor—even in a nonpublic forum—on the mere chance that speech might conceivably lead to disruption. *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) ("In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."); *Cohen v. California*, 403 U.S. 15, 20 (1971) (speech may not be curtailed without genuine evidence of disruption).

The bottom line is simple: just as "the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), so does the First Amendment. It does not allow states to restrict speech in order to achieve what political elites consider the "proper" form of democratic deliberation. While preserving order and quiet in a polling place is a legitimate objective, that should be achieved in the least censorious way possible, in order to respect the individual right of free expression.

ARGUMENT

I. FREEDOM OF SPEECH BELONGS TO THE INDIVIDUAL, NOT TO SOCIETY

A. This Court Should Explicitly Reject the "Civic Conception" of Free Speech and Make Clear that Individual Rights Take Precedence

Ever since Justice Holmes's dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919), it has been popular to describe the freedom of speech as a social construct designed to foster democratic deliberation and decision-making. Holmes believed that free speech is intended primarily to serve social goals, as opposed to the goals of individuals. While persecution for dissent was, in his view, "perfectly logical," the reason the Constitution bans persecution is in order to enable the public to find a "ground upon which [their] wishes safely can be carried out." *Id.* at 630 (Holmes, J., dissenting). This, he believed, is "better reached by free trade in ideas" than by censorship. *Id.* Free speech was thus a privilege given to the citizen by the state in order to achieve social goals—not a human right the state must respect.

This approach to the First Amendment—which holds that "the central constitutional goal" of free speech is "creating a deliberative democracy" instead of "protect[ing] preexisting private rights"—has been called the "civic conception" of free speech. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18, 28 (1993). It has proven extraordinarily influential.

See, e.g., THOMAS HEALY, THE GREAT DISSENT 249 (2013) (noting pervasiveness of the marketplace theory). It is, however, profoundly flawed.

It is true, of course, that ideas are best tested in competition with other ideas, and that free speech aids democratic decision-making. But that is *not* the primary reason the First Amendment was written. The authors of that Amendment viewed free speech not primarily as a tool for accomplishing public goals, but as a protection for a critical facet of personal autonomy that must be secured against intrusion for the *individual's* sake. James Madison made this clear when he described freedom of opinion in terms of property rights: the word "property," he wrote, "embraces every thing to which a man may attach a value and have a right," and therefore "a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them." James Madison, *Property* (1792), *reprinted in* JAMES MADISON: WRITINGS 515 (Jack Rakove, ed. 1999). This approach to free speech might be called the individualistic conception.

The individualistic conception does not contradict the idea that free speech aids in democratic deliberation, or that competition is the best way to test ideas. Thomas Jefferson, for example, embraced the individualistic conception—arguing that opinions are private matters over which government can have no legitimate power—but also acknowledged that free speech is "the only effectual agent[ ] against error" and "the test of . . .

investigation" for ideas. Thomas Jefferson, *Notes on the State of Virginia* (1787) *reprinted in* THOMAS JEFFERSON: WRITINGS 285 (Merrill Peterson, ed. 1984). But to the framers, the protection of the individual was more important than these social benefits of free speech.

They embraced the individualistic conception in conscious reaction *against* their own era's version of the civic conception, which was the British legal doctrine of "toleration." The ruler of toleration saw freedom of opinion (particularly religious opinion) as a privilege the king gave to the subject for public reasons, rather than as an individual right. The Constitution's authors rejected the principle of toleration for precisely this reason: because it subordinated the individual's freedom of opinion to social needs. The founders instead adopted the principle of *liberty of conscience*, which held that individuals are presumptively free to abide by and express their opinions.

Thomas Paine, for example, described toleration as "not the *opposite* of Intoleration, but . . . the *counterfeit* of it. . . . The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it." *Rights of Man: Part I* (1791), *reprinted in* THOMAS PAINE: COLLECTED WRITINGS 482 (Eric Foner, ed. 1995). George Washington, too, rejected toleration on the grounds that it assumed that "it [is] by the indulgence of one class of people, that another enjoy[s] the exercise of their inherent natural rights." George Washington, Letter to the Hebrew Congregation in Newport, R.I., Aug. 18, 1790, *in* GEORGE WASHINGTON: WRITINGS 767 (John Rhodehamel, ed. 1997). Today's

civic conception of free speech is essentially identical to the principle of toleration the founders repudiated.

One critical difference between the civic conception of speech and the individualistic conception is that the civic conception implicitly assumes that free speech may be curtailed to serve what political leaders consider to be the greater good. Thus for example, the two models of speech lead to different outcomes when considering the case of people who do not wish to participate in public deliberation, or to speak at all. The civic conception of speech "might well place no protection whatsoever on the right *not* to speak," writes one scholar, because if "forced expression might benefit the listener's self-governing decision making," compelling a person to speak "would actually seem to further [democratic] values." Martin H. Redish, *Freedom of Expression, Political Fraud, and the Dilemma of Anonymity*, *in* SPEECH AND SILENCE IN AMERICAN LAW 151 (Austin Sarat, ed. 2010) (emphasis added).

Thus in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), Justice Frankfurter, who embraced the civic conception of free speech, wrote for the Court in holding that the broader public good justified compelling school children to pledge allegiance to the flag. "[T]he freedom to follow conscience," wrote Frankfurter, "has . . . limits in the life of a society," as a consequence of the "principles which, as a matter of history, underlie[ ] protection of religious toleration." *Id.* at 594.

The Court repudiated that opinion only three years later in *West Virginia State Bd. of Educ. v.*

Barnette, 319 U.S. 624, 638 (1943), and embraced the individualistic conception of speech instead, when it declared that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects"—including free speech—"from the vicissitudes of political controversy" and "place them beyond the reach of majorities." *See also Cohen*, 403 U.S. at 24 (First Amendment was written "to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us").[4]

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[4] True, the civic conception of speech does recognize a limited role for dissent, since the dissenter can contribute to a more informed decision by the majority. But, again, the civic conception sees the value of dissent solely in terms of its contribution to public discussion. *See, e.g.*, CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 213 (2005) (arguing that democracies should "take steps to . . . promote dissent . . . partly to protect the rights of dissenters, but mostly to protect interests of their own"). People who simply do not want to participate in public discussion at all—who do not want to enter the "marketplace of ideas" in the first place—have no place in the civic conception. That explains why precedents based on the civic conception, such as *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), have authorized the government to override the rights of dissenters in the service of allegedly democratic goals: "As long as [a union] act[s] to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees." *Id.* at 223. It also explains why Professor Sunstein, among the most prominent advocates of the civic conception of speech, has described *Barnette* as "too cavalier": because it was based on a "belief[ ] in individual immunity from communal ties." Cass R. Sunstein, *Unity and Plurality: The Case of Compulsory Oaths*, 2 YALE J.L. & HUMAN. 101, 111 (1998).

Barnette, *Cohen*, and other cases embracing the individualist conception were correct. The First Amendment's expression provisions do not contemplate freedom of speech as a privilege given to the individual for social purposes, but as a right enjoyed by the individual for her own sake. That is certainly true of its religion clauses, which protect freedom of religion not to serve broader social goals, but to protect individuals *per se*. There is no reason to view the expression clauses as different.

In fact, James Madison himself pointed this out when he explained that both the speech and religion clauses of the First Amendment were designed to repudiate the civic conception of individual rights. He refuted those who took a narrow view of the Amendment's speech clauses—who claimed that those clauses did no more than incorporate English common law relating to free speech, which was based on the civic conception—by pointing out that "[t]he freedom of conscience, and of religion, are found in the same [Amendment] which assert[s] the freedom of the press." *See* James Madison, *Report on the Alien and Sedition Acts, January 7, 1800, reprinted in* JAMES MADISON: WRITINGS 648 (Jack Rakove, ed. 1999). Yet it would "never be admitted, that the meaning of the former, in the common law of England, is to limit their meaning in the United States." *Id.* Thus the speech clauses should also be read more broadly—as giving individuals greater security than the miserly protections that the English civic conception provided.

B. The Constitution Protects Free Speech to Secure Individual Freedom, Not Primarily to Serve Public Goals

What Justice Blackmun said of privacy rights is certainly true of free speech: the Constitution protects it "not because [it] contribute[s], in some direct and material way, to the general public welfare, but because [it] form[s] so central a part of an individual's life," and "embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) (citation omitted).

One indication that the First Amendment embraces the individualistic conception of speech instead of the civic conception is that the framers routinely referred to it as protecting freedom of *conscience*. The word "conscience" applies to individuals or to groups of individuals each expressing their shared individual opinions. *See, e.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (11th ed. 1797) (defining conscience as "[t]he knowledge or faculty by which we judge of the goodness or wickedness of our own actions," and "knowledge of our own thoughts"). Thus for example, James Wilson defined the "rights of conscience" as "[t]he right of private judgment. . . . To be deprived of it is insufferable. To enjoy it lays a foundation for that peace of mind, which the laws cannot give, and for the loss of which the laws can offer no compensation." 1 COLLECTED WORKS OF JAMES WILSON 539 (Kermit L. Hall, et al., eds. 2007). Thomas Jefferson wrote, in defense of his proposed Virginia Statute of

Religious Freedom, that "our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit." *Notes on the State of Virginia*, *supra* at 285. These words demonstrate that the purpose of constitutional protections for freedom of conscience was not to facilitate collective decision-making, but to protect individual rights, full stop.

The same is true of the First Amendment's speech and press clauses. While free speech plays an essential role in democratic government, its primary purpose is to secure individual freedom. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 264–87 (2017) (explaining founders' conception of free speech as an individual right). The expression clauses were designed to protect "freedom of opinion," or as Jefferson called it, "the rights of thinking, and publishing our thoughts by speaking or writing." Letter to David Humphreys (Mar. 18, 1789), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 323 (Albert Ellery Bergh, ed. 1907). The *Barnette* Court later called this "freedom of mind." 319 U.S. at 637. It is why even an expression without public political significance—such as a private poem, or a Jackson Pollock painting, or an aesthetic judgment—falls within the freedom of speech guarantee. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) ("[the] painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll" are "unquestionably shielded" by the First Amendment).

This is not to deny that free speech plays a critical role in democratic deliberation. But it is crucial to keep in mind that that is a secondary consequence—not the basis of the Constitution's protections. The purpose of free speech is to preserve the individual's sacrosanct freedom of mind. Where these priorities are reversed, the rights of dissent can too easily be overridden to serve allegedly greater public goods.

This happens routinely in the area of campaign finance regulation, where the rights of individuals to express and advocate for their own opinions, even in the political realm, are frequently violated in order to accomplish what political leaders claim are "democratic" goals. For example, the right of anonymous speech has been violated by statutes that compel individuals and groups to divulge their identities when contributing to a political campaign. *See, e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010) (upholding compulsory disclosure of identities of donors to political campaigns). Donors have been forbidden to contribute money to support political candidates as they wish, on the theory that such limits somehow make the outcome of a campaign more qualitatively democratic. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). Citizens and activist groups have even been forced to obtain federal pre-approval before exercising their First Amendment rights. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 335–36 (2010) (invalidating campaign finance regulations that were so complicated that they amounted to a prior restraint on speech).

Most shockingly, Americans have even been punished for displaying home-made signs advocating for candidates for public office, on the grounds that their signs constituted illegal in-kind contributions to a campaign—even though such signs are almost the prototypical instance of fully protected political speech. *See* Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in All the Wrong Places*, 2003 CATO SUP. CT. REV. 187, 187–88 (2003) (detailing case of Texas Republicans Bill Liles, Mark Morton, and Don Bryant, who were charged with violating campaign finance rules for displaying a sign painted on a large plywood board, mounted to the side of a cotton trailer supporting presidential candidate Texas Governor George W. Bush).

All these violations of the First Amendment result from the civic conception of speech, because it regards speech as a privilege extended to citizens for some broader "democratic" goal—which necessarily implies that the speech rights of individuals may be cut or stretched to serve that goal. Proponents of the conception openly admit that they believe it is "necessary to restrict the speech of some elements of our society in order to enhance the relative voice of others." Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1425 (1986) (internal quotations omitted). In practice, this means censoring persons or groups who are thought to have "too much" political influence or to be too effective in expressing their views.

Recent political debates over "dark money" are a prime example. Advocates of campaign finance

restrictions allege that wealthy donors to political candidates or campaigns have a "disproportionate" effect on political debates, which "distorts" the democratic process. *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 671–87 (1997). They therefore support laws that deprive citizens of the right to participate in the political process in order to result in a more "balanced" or "fair" public debate which will presumably result in the "right" democratic outcome. *See* Smith, *supra* at 204. Even this Court once referred to the "distorting effects" on democracy purportedly caused by "immense aggregations of wealth," *Austin*, 494 U.S. at 660—implying that the ability to effectively persuade others in the marketplace of ideas is somehow a "distortion" of the democratic process.

In recent years, political leaders have even begun to force think-tanks and other non-profits that do *not* endorse candidates to disclose the identities of their donors, on the theory that these think-tanks are distorting the democratic process by promoting their views and seeking to persuade voters and politicians to act. *See, e.g.*, *Center for Competitive Politics*, 784 F.3d 1307; *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016).

In a case that the Goldwater Institute is currently litigating, the city of Santa Fe, New Mexico, adopted an ordinance forcing donors to non-profit organizations to publicly disclose their names, addresses, and other information, if the organizations to which they contribute spend $250 to support or oppose a ballot measure.

When the non-profit Rio Grande Foundation posted on its Facebook page a video opposing a citywide ballot measure to impose a $0.02 tax on large sodas, the city sent the Foundation a threatening letter complaining that it had "reached more than 100 eligible voters," and insisting that it provide the city with confidential information about its supporters. *See* Complaint, *Rio Grande Found. v. City of Santa Fe, et al.*, No. 1:17-cv-00768 at ¶¶ 19–22 (D. N.M., filed July 26, 2017).

These instances of censorship are all premised on the idea that the speech of some elements of society can be abridged to serve broader, more "democratic" purposes, because the goal of speech is to promote collective ends rather than individual ones. Because the civic conception of the First Amendment is flawed, has no constitutional foundation, and leads ultimately to censorship, this Court should reject it and decline to uphold the Minnesota statute on that basis.

II. THE MINNESOTA STATUTE CANNOT BE JUSTIFIED ON THE BASIS OF MAINTAINING ORDER OR PREVENTING "INFLUENCE"

A. Preventing "Persuasion" or "Influence"-by-Speech is Not a Legitimate Government Interest and Attempting to do so Inherently Amounts to Content-Based Censorship

The court below found that the statute aims "to ensure a neutral, influence-free polling place" by banning "all political material," Pet. App. at A-6, and all

"material designed to influence or impact voting." *Id.* at A-3. The statute itself forbids efforts to "persuade a voter." M.S.A. § 211B.11(1). But while eliminating disruption, violence, or bribery in a polling place is certainly a legitimate government interest, eliminating speech that merely influences or persuades is not. One of the main purposes of speech is to influence, and it is not possible to distinguish between speech that influences and speech that does not influence.

Obviously one primary reason people engage in expression is to influence others. This is not improper, nor is there any legitimate basis for drawing the line at the polling place. Just as a student does not lose her First Amendment at the schoolhouse gate, *Tinker*, 393 U.S. at 506, so a voter does not surrender his right to speak when he participates in voting. So long as expression is not disruptive, does not interfere with public employees' duties, and does not amount to intimidation, assault, bribery, or some other tort or crime, the state has no legitimate basis for banning it.

In fact, speech designed to "influence" occurs in the polling place all the time: voters carry voting guides into the voting booth, which recommend voting one way or other and include "pro" and "con" statements regarding candidates and ballot initiatives. *See Cotham v. Garza*, 905 F. Supp. 389 (S.D. Tex. 1995) (invalidating ban on voting guides in the voting booth). The ballot itself can contain language chosen by candidates in an effort to influence voters—such as the way the candidate chooses to describe his profession. *See* Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693,

705–08 (2016). Voters can enter the polling booth with smart phones, and use them to text message friends or family members to ask how they should vote. In Minnesota and other states that allow voting by mail, *see* M.S.A. § 204B.45,[5] voters can fill out their ballots in their kitchens while listening to Rush Limbaugh or Rachel Maddow. Disabled voters can even vote in their cars in Minnesota, M.S.A. § 204C.15, while a talk show plays on the radio. In Oregon, *all* voting is done by mail—meaning that all of the state's voters can be subjected to "influence" or "persuasion" during the voting process. O.R.S. § 254.470.

"Influence" of this sort occurs frequently in other voting contexts. At shareholder meetings, City Council or Town Hall meetings, board of trustee meetings, jury deliberations, and other places, votes are often cast immediately after or even during discussions about how to vote. Candidates themselves vote, often with the media photographing them doing so, despite the fact that their very faces are associated with "recognizable political views," and their very presence at the polling place must inevitably "influence" voters. *See, e.g.*, CNN, *Man to Obama: Don't Touch My Girlfriend* (Oct. 21, 2014).[6] In a 1966 case, the Arizona Court of Appeals found that a person violated the electioneering merely

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[5] This option is quite popular in Minnesota. *See* Rachel E. Stassen-Berger, *Absentee Ballot Update: Minnesota Records Smashed*, Twin Cities Pioneer Press (Nov. 3, 2016), http://www.twincities.com/2016/11/03/nearly-416000-absentee-ballots-have-already-voted-13-percent-of-registered-voters/.

[6] https://www.youtube.com/watch?v=N1DHfOuXilc.

by serving as a poll worker on election day and introducing herself to voters, because her name also appeared on the ballot. *Fish v. Redeker*, 411 P.2d 40 (Ariz. App. 1966).

But influencing and persuading voters is what elections are *for*. At the time the First Amendment was written, this was the ordinary practice for federal and state elections, which were typically held in the open; after both candidates spoke to the crowd, voters would immediately and openly express their preferences. *John Doe No. 1*, 561 U.S. at 224–26 (Scalia, J., concurring).

The effort to eliminate "influence"—as opposed to the proper elimination of bribery, intimidation, etc.—is the product of a more recent era, and one guided by the flawed civic conception of free speech, which imagines that there is some correct, objective democratic outcome that would result if the process were cleansed of improper "influences." This is inevitably doomed, because "[t]here is always more speech out there, giving some people 'undue' influence and thereby posing at least the threat of the appearance of corruption," and therefore always another round of further restrictions on speech in an effort to stamp out such influence. Bradley A. Smith, *The John Roberts Salvage Company: After* McConnell, *A New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891, 903 (2007).

As James Madison warned, it would be "folly to abolish liberty, which is essential to political life, because it nourishes faction." THE FEDERALIST No. 10 at 58 (J. Cooke,0 ed. 1961). Attempts to restrict free

speech in order to prevent vaguely-defined bad "influences" on voters is exactly that.

Because it is impossible to define "influence" with precision, efforts to enforce this prohibition will inevitably end with bias and discrimination, perhaps unconsciously so. Vague speech restrictions encourage discriminatory enforcement. *See, e.g.*, *Miller ex rel. Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 629 (E.D. Pa. 2008) (finding ban on T-shirts that cause "distraction" to be unconstitutionally vague). In the *Purcell* case, for example, a Maricopa County official instructed poll workers that they could not allow voters to wear shirts that said "Don't Tread on Me"—a phrase that appeared on one of the nation's earliest flags—because, in that official's opinion, the flag had been "co-opted" by "the Tea Party." Complaint, *Reed v. Purcell*, No. CV 10-2324-PHX-JAT (D. Ariz. Oct. 28, 2010), Doc. No. 1 at ¶¶ 28–29. Here, the risk of arbitrary and discriminatory enforcement is greater, given the extraordinary breadth of the prohibition. The court below even held that the state could forbid a person from wearing a button that simply says "Liberty" Pet. App. D-2. Suffice it say that any rule that forbids a voter from wearing the nation's flag or the word "liberty" while casting a ballot is probably unconstitutional.

B. Maintaining Order is a Legitimate Government Interest, But the Minnesota Ban Does not Appropriately Serve that Interest

The state also asserts that the statute serves a legitimate interest in maintaining the orderly operation of a polling place. But while that interest is legitimate, the state may not serve that interest in a way that curtails more speech than necessary. The correct path was laid out in *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1216–17 (9th Cir. 1996), which held that the state violated the First Amendment when it prohibited "religious advocacy" and the display of religious materials outside the employees' cubicles and offices. Offices in a government building are a non-public forum. *Id.* at 1214–15. Yet the court still found the ban overly broad. While maintaining order and decorum in a government workplace is a legitimate government interest, the state still could not impose an across-the-board ban on speech to serve that interest. "[T]he undefined term 'religious advocacy' encompasses a wide range of speech," the court found, "much of it permissible." *Id.* at 1217.

Exactly the same analysis applies here. Minnesota has a legitimate interest in preserving order in the polling place, but that cannot justify an absolute prohibition on political clothing or buttons—a ban so broadly worded that it encompasses a wide range of permissible speech. The court below concluded that the ban is viewpoint-neutral because it prohibits all speech by "a group with recognizable political views."

Pet. App. A-3. But the *breadth* of this prohibition cannot cure its *vagueness*. As the dissent below observed, even a flag depicting a Star of David might qualify as "political" and therefore "influential" under this statute. Pet. App. D-18 n.7 (Shepherd, J., dissenting). Is a person who wears a shirt saying "Build the Wall" in violation of the statute? Or "#MeToo"? Or a shirt with a picture of a marijuana leaf?[7] Or a humorous shirt that says "Nixon in 2020: Tanned, Rested, Ready"?[8] It's anybody's guess.

Also instructive here are *Cohen* and *Tinker*. In *Cohen*, this Court found that the state could not prosecute a man who wore a jacket saying "fuck the draft" in a courthouse, notwithstanding that a courthouse hallway is certainly not a public forum, and the state has authority to preserve propriety and order there. Yet the Court found it excessive for the state to forbid such expression on the mere possibility that disruption might result. 403 U.S. at 20 (there was "no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result").

Similarly, in *Tinker*, there was no denying that the state has a legitimate interest in maintaining order, decorum, and discipline on a public school campus—more so, even, than it has over a polling place, since the state stands *in loco parentis* over schoolchildren, but

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[7] In *Purcell*, 2010 WL 4394289 at *4, poll workers in Maricopa County, Arizona, were instructed that a T-shirt with a picture of a marijuana leaf would be prohibited, because an initiative regarding medical marijuana was on the ballot.

[8] https://goo.gl/W6Vk6s.

not over voters. Yet this Court held that students have a First Amendment right to express themselves by wearing clothing that conveys a political message, "unless it 'materially and substantially interfere(s) with the requirements of appropriate discipline in the operation of the school.'" 393 U.S. at 505 (citation omitted). And even then, school officials bear the burden of bringing forth "evidence that [a prohibition] is necessary to avoid material and substantial interference with schoolwork or discipline." *Id.* at 511.

Adult voters participating in an election—during which they have presumably participated in public deliberation on the merits of candidates or ballot measures—certainly have broader expressive rights than students in a public school classroom. The government bears the burden of providing *some* evidence that the restriction here is necessary. *Cf. Rideout v. Gardner*, 838 F.3d 65, 73 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (April 3, 2017) (invalidating law against "ballot selfies" and noting that "[t]he government's burden is not met when a 'State offer[s] *no* evidence or anecdotes in support of its restriction.'" (citation omitted)). Yet the court below made no effort to determine whether there was *any* basis for believing that an absolute prohibition on speech that might be construed by polling place workers as "political" is necessary to preserve order.

On the contrary, the prohibition here is *more likely to provoke a disturbance* than a citizen wearing a T-shirt or a button. The statute encourages busybody monitoring of the clothing voters wear, and the record

shows that in some instances this did result in disorder and indecorum. One voter was ordered to remove his T-shirt. Another was "delayed several *hours*" before he was allowed to vote. Pet. App. D-3 (emphasis added). Still another was forced to turn over his name and address. *Id.*

Such disruption has also occurred in other, similar cases. In *Wickburg*, *supra*, an Arizona voter went to her polling place on election day wearing a white T-shirt with a picture of the U.S. flag and the Constitution and the words "Flagstaff Tea Party-Reclaiming Our Constitution Now." *See* Complaint, *Wickburg v. Owens*, No. 3:10-cv-08177-JAT, Doc. No. 1 at ¶¶ 12–13 (D. Ariz. filed Sept. 20, 2010). She was ordered to turn her shirt inside out or "go out and get a jacket" to cover it before she would be allowed to vote. *Id.* ¶ 15. Poll workers intimidated and scolded her, then allowed her to vote "only because" no other voters were present at the time. *Id.* ¶ 18. At the next election, she again wore her shirt, and poll workers allowed her to vote only after she covered it with a sweater. *Id.* ¶¶ 30–31. As she left, poll workers told her she would not be allowed to vote if she wore the shirt again. *Id.* at ¶ 33.[9]

These incidents demonstrate that prohibitions on the non-disruptive wearing of a T-shirt or button are *more* likely to lead to confrontation, intimidation, harassment, confusion, delay, and disruption than simply

[9] The voter then sued. After a federal judge enjoined another Arizona county from enforcing a similar ban (*Purcell*, *supra*), her case was settled and the government agreed not to enforce the ban.

respecting the right of voters to wear what they like. That problem is accentuated by the breadth of the ban in this case, because it is more likely the people wearing T-shirts that are only marginally "political"—such as a Star of David or a marijuana leaf—will object to being commanded to cover their shirts or turn them inside-out. Unreasonably broad bans of this sort will inevitably provoke *more* confrontations—and did, in fact, in this case—thereby leading to greater disruption in the polling place.

The Minnesota ban therefore must fail under the order-and-decorum theory because it is too broad to serve that purpose without also intruding on constitutionally protected speech; it lacks an evidentiary basis to show that disruption is really likely to follow voters wearing T-shirts or buttons, and it is not reasonably designed because it is likely to cause—and in fact *has* caused—more disturbance at the polls, not less.

CONCLUSION

The state has a legitimate interest in prohibiting disorder, violence, intimidation, bribery, threats, and other crimes and torts at the polls. But it cannot seek to prevent the mere possibility of such things by prohibiting speech, without at least providing some evidence that this risk is genuine. *Tinker*, 393 U.S. at 738; *Cohen*, 403 U.S. at 20. And it has *no* legitimate interest in preventing, restricting, or shaping "influence." That objective is based on the flawed assumption that the

freedom of speech is designed to further collective aims instead of individual ones. The government has no legitimate interest in "democratiz[ing] . . . influence[s]" by restricting who may speak and about what and where. *Nixon*, 528 U.S. at 401 (Breyer, J., concurring). And efforts to do so will inevitably encourage arbitrary and discriminatory enforcement, at the expense of First Amendment protections.

The judgment should be *reversed*.

Respectfully submitted,
Dated: January 10, 2018

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No. 16-1435

In The
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL.,

Petitioners,

v.

JOE MANSKY, ET AL.,

Respondents.

On Writ Of *Certiorari*
To The United States Court Of Appeals
For The Eighth Circuit

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech, previously known as the Center for Competitive Politics, is a nonpartisan, nonprofit organization that works to protect and defend the First Amendment rights of speech, assembly, and petition. As part of that mission, the Institute represents individuals and civil society organizations, *pro bono*, in cases raising First Amendment objections to burdensome regulation of core political activity. In addition, under its previous name, the Institute has participated as *amicus curiae* in many of this Court's most important First Amendment cases, including *McCutcheon v. Federal Election Commission*, 572 U.S. __; 134 S. Ct. 1434 (2014), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

SUMMARY OF THE ARGUMENT

In-person voting requires citizens, some of whom doubtless disagree on political questions, to share a communal space as they wait to cast their ballots. The State of Minnesota believes that apparel conveying any "political" idea threatens to destroy

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. Petitioner's blanket consent to the filing of *amicus* briefs was filed with the Court on November 27, 2017, and Respondent's blanket consent to such briefs was filed on December 7, 2017.

this harmony and cause chaos at the polling place. Consequently, it banned such messages.

Contrary to the State's view, Americans can tolerate messages they may disagree with, especially during the defining moment at which citizens collectively choose their representatives. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-272 (1971) (it is "conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people'") (quoting *Roth v. United States*, 352 U.S. 476, 484 (1957)). The illiberal assumption behind Minnesota's law—that Americans are incapable of knowingly being around those with whom they disagree—is unproven and irreconcilable with many of this Court's cornerstone First Amendment precedents.

These concerns are exacerbated by Minnesota's failure to precisely define the expression it wishes to ban. By regulating clothing displaying venerable symbols of the American Revolution itself, and not merely advocacy for or against candidates on the ballot, the State shows that the word "political" has lost any clear meaning. This vagueness, which is particularly troubling in the First Amendment context, poses a trap for the unwary that must be remedied.

The Court should facially invalidate the State's ban. But, failing that, First Amendment interests can be protected through a narrowing construction prohibiting only messages that expressly advocate for candidates on the ballot. *E.g. Buckley v. Valeo*, 424 U.S. 1, 79-81 (1976) (*per curiam*).

ARGUMENT

I. *Burson v. Freeman*, which is based on the government's interest in preventing polling places from descending into "scenes of battle, murder, and sudden death," does not control here.

Casting a ballot is an inherently political act "of the most fundamental significance under our constitutional structure." *Ill. State Bd. of Elections v. Socialist Workers' Party*, 440 U.S. 173, 184 (1979); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1439 (1987) ("th[e] single idea" of "the sovereignty of the People…informs every article of the Federalist Constitution, from the Preamble to Article VII"); *see also* U.S. Const. amend. X. After all, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. ___; 134 S. Ct. 1434, 1440-1441 (2014) (Roberts, C.J., controlling op.).

Nevertheless, Respondents posit that free expression may be broadly limited within the polling place itself, at the conclusion of "a campaign for political office" when First Amendment protections are especially important. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 233 (1989).

The Eighth Circuit agreed, relying heavily on this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992). But that case approves only modest restrictions on electioneering which "'maintain peace, order[,] and decorum'" at the polls. 504 U.S. at 193

(quoting *Mills v. Ala.*, 384 U.S. 214, 218 (1966)). It cannot be read to reach the conduct at issue here.

a. Burson v. Freeman *cannot be divorced from its particular concern with preventing electoral fraud and political violence.*

Burson is a narrow exception to the general rule, enshrined in the First Amendment, that "[t]o permit the continued building of our politics and culture...our people are guaranteed the right to express any thought, free from government censorship." *Police Dep't of Chicago v. Mosley*, 408 U.S 92, 95-96 (1972). *Burson* upheld a Tennessee statute imposing a "minor geographic limitation," premised on the belief that "the[] last 15 seconds before its citizens enter the polling place should be their own...free from," the "'distribution of campaign materials[] and solicitation of votes for or against any person or political party or position on a [ballot] question." 504 U.S. at 210; *id.* at 193-194 (quoting Tenn. Code Ann. § 2-7-111(b) (Supp. 1991)).

The plurality only sanctioned this narrow campaign-free zone after a thorough historical review. In particular, it canvassed the safeguards implemented to ensure both the integrity of the franchise and the peaceful conduct of the balloting itself. *Burson*, 504 U.S. at 206. And the plurality noted that "all 50 States, together with numerous other Western democracies, settled on the same solution" to these "two evils...a secret ballot secured in part by a restricted zone around the voting compartments." *Id.* This historical review was essential to the plurality's articulation of the government interest. Nevertheless, Respondents

would use *Burson* to insulate activity that will disrupt neither pillar of voting security. *Id.*, 504 U.S. at 220 (Stevens, J., dissenting) (noting the plurality's reliance on the "practice's long life" and "history"); *id.* at 214 (Scalia, J., concurring) ("...restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot").

Thus, the "peace, order, and decorum" interest must be understood as an outgrowth of the bloody history of Nineteenth Century American elections, which were "not a very pleasant spectacle for those who believed in democratic government." *Burson*, 504 U.S. at 202 (citation and quotation marks omitted). Before the adoption of the secret ballot and the campaign-free zone, outright vote purchasing and political violence were common practice. *Id.* at 201-202. Indeed, naked "bribery of voters" was both "sufficient to determine the results of" the 1888 Presidential election in Indiana, *id.* at 201, n.6,[2] and so widely known that it inspired a schoolyard ditty. Paul F. Boller, *Presidential Campaigns: From George Washington to George W. Bush* 160 (2004) ("Steamboat coming 'round the bend; Goodbye, old Grover, goodbye[;] Filled up full with Harrison's men; Goodbye, old Grover, goodbye!").

Perfidious campaign workers pressing party tickets hounded voters "[a]pproaching the polling place," resorting to "[s]ham battles...to keep away elderly and timid voters of the opposition." *Burson*,

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[2] Benjamin Harrison defeated Grover Cleveland in Indiana by a mere 2,348 votes in 1888. *1888 Presidential Election Results -- Indiana*, United States Election Atlas, https://uselectionatlas.org/RESULTS/state.php?year=1888&fips=18&f=0&off=0&elect=0.

504 U.S. at 202. "[C]oats were torn off the backs of voters...ballots of one kind...snatched from voters' hands and others put in their places, with threats against using any but the substituted ballots." *Id.* at 204, n.8. At this time, American "polling places were frequently, to quote the litany, 'scenes of battle, murder, and sudden death.'" *Id.* at 204 (citation and quotation marks omitted).[3]

Given this history, the *Burson* plurality determined that immunizing the fifteen-second walk to the polling place from partisan warfare did not unduly offend the First Amendment. But that determination, rooted as it is in a history of campaign workers chasing and assaulting voters, cannot be rotely applied to Minnesota's blanket ban on the wearing of all "political" apparel by voters themselves.

Had the court of appeals properly applied *Burson*, it would have demanded that Respondents prove that the wearing of politically-themed garments threatened to revert the State's polling places to "scenes of battle, murder, and sudden death." *Id.* at 204 (citation and quotation marks omitted). It did not do so, which, in and of itself, is fatal. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995)

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[3] Indeed, one of the more widely accepted theories regarding the death of American poet Edgar Allan Poe involves Election Day violence. Natasha Geiling, *The (Still) Mysterious Death of Edgar Allan Poe*, Smithsonian Magazine, Oct. 7, 2014 ("Others believe that Poe fell victim to a practice known as cooping, a method of voter fraud practiced by gangs in the 19th century where an unsuspecting victim would be kidnapped, disguised[,] and forced to vote for a specific candidate multiple times under multiple disguised identities"), https://www.smithsonianmag.com/history/still-mysterious-death-edgar-allan-poe-180952936/

("...when the Government defends a regulation on speech as a means...to prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural...") (citation and quotation marks omitted, punctuation altered for clarity).

b. There is a general presumption, not countered here, that individuals can encounter speech they oppose without recourse to violence.

Restrictions on speech, following *Burson*, must directly protect "peace, order, and decorum" at the polling place. But there is little to no evidence that mere political apparel poses any risk to that interest, especially where a ban extends far beyond messages whose "very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace." *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942); *see* Pet. App. I-1-2 (barring "promoting a group with recognizable political views"); *Tex. v. Johnson*, 491 U.S. 397, 416 (1989) ("[T]he distinction between written or spoken words and nonverbal conduct...is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here"). The issue speech regulated here, by its very nature, has tremendous "social value" and constitutes an "essential part of any exposition of ideas." *Chaplinsky*, 315 U.S. at 572; *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence"). It cannot be reasonably regulated as though it is inherently dangerous.

In fact, many of this Court's First Amendment precedents are grounded in an underlying presumption that Americans, uncomfortable with another's message though they may be, can perform their civic duties and go about the day without resort to violence. *Cohen v. Calif.*, 403 U.S. 15, 21 (1971) ("Of course, the mere presumed presence of unwitting listeners or views does not serve automatically to justify curtailing all speech capable of giving offense"); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability").

This Court reaffirmed this general principle just last Term. *Matal v. Tam*, 582 U.S. __; 137 S. Ct. 1744, 1763 (2016) (Alito, J., controlling op.) ("Giving offense is a viewpoint. We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'") (quoting *Street v. N.Y.*, 394 U.S. 576, 592 (1969)). It should continue to hold the line against the illiberal fantasy that individuals cannot help but violently react to disfavored speech. *See* Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind*, The Atlantic, Sept. 2015 ("When speech comes to be seen as a form of violence, vindictive protectiveness can justify a hostile, and perhaps even violent, response").[4]

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[4] https://www.theatlantic.com/magazine/archive/2015/09/thecoddling-of-the-american-mind/399356/

Freedom of expression lies at the foundation of our rights as a self-governing people. It should not be banished at the ballot box because of an unproven and irrational misconception.[5] *Whitney v. Calif.*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of free speech to free men from the bondage of irrational fears").

II. Even if the apparel ban furthered legitimate ends, its application here demonstrates its unconstitutional vagueness.

In addition to being tailored to a particular history, the Tennessee ban upheld in *Burson* had the virtue of being straightforward and easily understood. Tennessee banned the display and distribution of *campaign*, as opposed to merely *political*, materials, and expressly prohibited the "'solicitation of votes for or against'" candidates, parties, and ballot measures. *Burson*, 504 U.S. at 193-194 (quoting Tenn. Code Ann. § 2-7-111(b) (Supp. 1991)).

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[5] *See* Elizabeth Nolan Brown, *Hate Crimes, Hoaxes, and Hyperbole: A reality check for all sides*, Reason, Nov. 18, 2016 ("The bottom line is that when it comes to physical aggression inspired by this election, we are looking at a little more than a dozen incidents reported, over a 10 day period, in a country of roughly 318.9 million people—none of which resulted in serious injuries"), http://reason.com/blog/2016/11/18/election-hate-crimes-hoaxes-hyperbole.

This case touches on First Amendment free political expression, and "[p]recision of regulation must be the touchstone in an area so closely touching on our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Buckley v. Valeo*, 519 F.2d 821, 874 (D.C. Cir. 1975) (*en banc*) ("'Vague laws in any area suffer a constitutional infirmity,' and commonly in the First Amendment area doubly so") (quoting *Ashton v. Ky.*, 384 U.S. 195, 200 (1966)). Precise language ensures that laws seeking to regulate the act of campaigning do not reach individuals "whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance." *Buckley*, 519 F.2d at 870.

Here, Respondents have expanded the term "political insignia," Minn. Stat. Ann. § 211B.11(1), to cover the wearing of apparel that merely contains "classic American phrases such as 'Liberty' and 'Don't [T]read on [M]e'" or portrays the Gadsden flag, a symbol of the very war that won the franchise in the first place. Pet. Reply Br. in Supp. of *Cert.* at 8. Threatening individuals with prosecution for wearing venerable symbols of the Republic, as happened here, demonstrates that Minnesota's law lacks a cognizable limiting principle. *See United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972) ("On the Government's thesis, every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another...The dampening effect on [F]irst [A]mendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable").

Whether a voter's apparel is "[i]ssue oriented material designed to influence or impact voting," Pet. App. I-2, will turn, inevitably, on the opinions of the viewer. Here, the danger of inconsistent interpretation and enforcement is compounded by Minnesota's decision to leave its intent-and-effect test to the judgment of poll workers. *Cf. Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) ("No reasonable speaker would choose to" act if the "only defense to a criminal prosecution would be that its motives were pure. An intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion'") (quoting *Buckley*, 424 U.S. at 43). Given such a "standard," all sorts of non-electoral speech will be banned, even speech that the wearer did not intend to carry a partisan message.[6]

The Gadsden flag itself can inspire conflicting responses. Its image is reflected in the motto and insignia of the 369th Infantry Regiment, an African-American unit that fought in the First World War and whose soldiers were "the first Americans of any race to receive the coveted Croix de Guerre." Henry Louis Gates, Jr., *Who Were the Harlem Hellfighters?*, The

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[6] *See* Simon P. Newman, *Parades and the Politics of the Street: Festive Culture in the Early American Republic* 163 (2010) (recounting that the 1790s era Federalist Party encouraged citizens to wear a black cockade as a show of solidarity during the Quasi-War, and initially viewed the positive citizen response "as evidence of a rise in the popularity" of the Adams administration, but "it seems likely that many citizens adopted the badge as evidence of their patriotism" during the crisis, as "[w]ith the end of the Quasi-War, the popularity of the black cockade faded rapidly...").

Root, Nov. 11, 2013[7]; Jeffrey T. Sammons and John F. Morrow, Jr., *Harlem's Rattlers and the Great War: The Undaunted 369th Regiment and the African-American Quest for Equality* 2 (2014) ("[The regiment's] adopted symbol, the rattlesnake...identified these citizen-soldiers with a Revolutionary War icon of indigenous power, defiance, and independence...indelibly captured in the motto of the Gadsden flag, 'Don't Tread on Me'"). By contrast, others have asserted that the flag denotes anti-black racism. See Eugene Volokh, *Wearing "Don't Tread on Me" insignia could be punishable racial harassment*, The Washington Post, Aug. 3, 2016 (describing complaint filed with the Equal Employment Opportunity Commission regarding a co-worker's display of a Gadsden flag).[8]

The United States Navy, on the other hand, takes the sensible position that a variant of that flag is a "symbol of resolve," and flies it in time of war. Corwin Colbert, *"First Navy Jack" Flies in Hawaii to Honor 17 Sailors Lost in Collisions*, U.S. Dep't of Defense, Jan. 3, 2018[9]; *see also* SECNAV Instruction 10520.6 (May 31, 2002) ("To provide for the display of the first navy Jack on board all U.S. Navy ships during the Global War on Terrorism...a flag consisting of 13 horizontal alternating red and white

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[7]https://www.theroot.com/who-were-the-harlem-hellfighters-1790898837.

[8]https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/03/wearing-dont-tread-on-me-insignia-could-be-punishable-racial-harassment/?utm_term=.90bd484313b8.

[9]https://www.defense.gov/News/Article/Article/1408008/first-navy-jack-flies-in-hawaii-to-honor-17-sailors-lost-in-collisions/

stripes bearing diagonally across them a rattlesnake in a moving position with the motto 'Don't Tread On Me'").

Simply put, the venerable Gadsden flag, like any historical symbol, may be perceived as having any number of messages, and should not be taken to convey granular political views such as support for a particular candidate.[10] Nevertheless, Minnesota has chosen to force those wearing such classic emblems to risk prosecutions that will inevitably reflect the human tendency to see patterns that may not be there and to read messages into even the most universal symbols. This poses a classic trap for the unwary that must be remedied. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

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[10] Indeed, quite recently, the mere act of wearing the national ensign itself on one's lapel was seen by some as support for the incumbent President or for the Iraq war. Gilbert Cruz, *A Brief History of the Flag Lapel Pin*, Time Magazine, July 3, 2008, ("But it was Richard Nixon who brought the pin to national attention... Nixon commanded all of his aides to go and do likewise. The flag pins were noticed by the public, and many in Nixon's supposed 'silent majority' began to similarly sport flags on their lapels"), http://content.time.com/time/nation/article/0,8599,1820023,00.html; David Wright and Sunlen Miller, *Obama Dropped Flag Pin In War Statement*, ABC News, Oct. 4, 2007 ("'You know, the truth is that right after 9/11, I had a pin,' [then-Sen. Barack] Obama said. 'Shortly after 9/11, particularly because as we're talking about the Iraq War, that became a substitute for I think true patriotism... '"), http://abcnews.go.com/Politics/story?id=3690000.

III. To avoid "the shoals of vagueness," this Court may apply a construction limiting the apparel ban to speech constituting express advocacy for or against a candidate or issue on the ballot.

As this case shows, Minnesota's use of the bare term "political insignia" does not adequately describe the speech it seeks to ban. This is especially dangerous since political speech lies at the core of the First Amendment's protections. *Buckley*, 519 F.2d at 873 ("[I]ssue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society...")

This is not a new problem. In *Buckley v. Valeo*, the Court encountered a $1,000 limit on expenditures "relative to a clearly identified candidate"—arguably a clearer phrase than "political insignia." *Buckley*, 424 U.S. at 39 (citation and quotation marks omitted). Nevertheless, the Court held that this phrase was unconstitutionally vague because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42.

Just so here. A central problem with Minnesota's approach is that it conflates "political" messages about the election with "political" messages generally. In *Buckley*, the Court solved this problem by adopting a limiting construction: the expenditure limit would apply "only to expenditures for communications that, in express terms advocate the

election or defeat of a clearly identified candidate for federal office." *Id.* at 44.

The Court in *Buckley* nevertheless invalidated that provision, even as so narrowed. *Id.* at 51. And *Amicus* believes that the Court should do the same here. But "the shoals of vagueness" may be avoided, "consistent with the legislature's purpose," by adopting *Buckley*'s limiting construction. *Buckley*, 424 U.S. at 78. The State's interest in avoiding politicking at the polls can be fulfilled by reading "political" to mean "express advocacy for or against a candidate or question appearing on the ballot."

In the years after *Buckley*, the "express advocacy" standard has been routinely applied in the campaign finance context. *Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 555 (4th Cir. 2012) (upholding federal express advocacy requirements against vagueness challenge); *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788 (10th Cir. 2013) (same). There is little reason to suspect that it could not be applied here.

Not only would this reading of "political" provide vital clarity, it would limit the government's ban to obvious campaigning for and against candidates for office. This approach both prevents subjective determinations of symbolic meaning by low-level state workers and narrows the State's regulation to more closely fit the specific governmental interest identified by the *Burson* plurality.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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No. 16-1435

In The
Supreme Court of the United States

Minnesota Voters Alliance et al., *Petitioners*

v.

Joe Mansky et al., *Respondents*

On Writ of Certiorari to the
U.S. Court of Appeals for the Eighth Circuit

Brief of Amicus Curiae James Madison Center for Free Speech, Inc. Supporting Petitioners

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Questions Presented

Is Minnesota Statute Section 211B.11, which bans all political apparel at the polling place, facially overbroad under the First Amendment?

Amicus focuses on the included issue of whether this Court's "express words of advocacy" test, *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976)—including the First Amendment doctrines underpinning it such as required "precision of regulation" and rejection of "intent and ... effect" tests, *id.* at 41, 43—should be applied to cure the imprecision and overbreadth here.

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Interest of Amicus Curiae[1]

The purpose of the James Madison Center for Free Speech is to support litigation and public education activities defending rights of political expression and association. The Madison Center is an internal educational fund of James Madison Center, Inc., a District of Columbia non-profit corporation. Madison Center is tax-exempt under 26 U.S.C. 501(c)(3). Counsel for Amicus have authored articles, testimony, and comments and litigated numerous cases involving campaign-finance and free-speech issues. James Bopp, Jr. is Madison Center's general counsel. Cases in which he was counsel in this Court include *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *FEC v. Beaumont*, 539 U.S. 146 (2003), *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006), *Randall v. Sorrell*, 548 U.S. 230 (2006), *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), *Citizens United v. FEC*, 558 U.S. 310 (2010), *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012), and *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014).

Summary of the Argument

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court established the express-advocacy test to cure imprecision and overbreadth. *Buckley* emphasized that the First Amendment imposes its own requirement of special "precision of regulation," apart from due-process concerns with notice and fair enforcement, to prevent

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[1] Rule 37 statement: All parties filed blanket consents; no counsel for any party authored this brief in whole or in part; and no person or entity other than amicus or its counsel funded its preparation or submission.

chilling protected speech, including especially issue advocacy. Failure to precisely define the scope of regulation resulted in the overbreadth resulting from lack of narrow tailoring, including sweeping in issue advocacy. In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court confirmed that the express-advocacy constructions that *Buckley* did largely under the label of fixing "vagueness" were also in fact done to prevent "overbreadth" by lack of narrow tailoring, including sweeping in protected issue advocacy, and then *MCFL* employed the express-advocacy construction too. As part of requiring "precision of regulation," *Buckley* expressly rejected intent-and-effect tests, as would be affirmed in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"). And *Buckley* also rejected regulation of mere "political" speech by refocusing a disclosure provision to reach "campaign-related" activity before imposing both the major-purpose test and the express-advocacy test to assure that the disclosure provision was not overbroad, did not sweep in issue advocacy and issue-advocacy groups, and reached only activity that is "unambiguously campaign related." *See* Part I.

In *Burson v. Freeman*, 504 U.S. 191 (1992), this Court upheld a case similar to the present one that involved "campaign materials" and "solicitation," both of which would have been understood in light of *Buckley*. So *Burson* provides no authority for upholding the present restriction of "political" items. *See* Part II.

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court said *Buckley* (and consequently *MCFL* too) used the express-advocacy simply as a saving construction to avoid vagueness and overbreadth, and not as a constitutional mandate to specially protect issue advocacy.

But it left intact the ability of courts to use the express-advocacy construction to save imprecise and overbroad statutes that are amenable to such a construction. *See* Part III.

After *McConnell*, federal circuit courts recognized that *McConnell* left intact the ability to use the express-advocacy construction to save imprecise and overbroad provisions, finding some provisions amenable to such construction and others not. *See* Part IV.

The foregoing doctrines prove that the provision at issue, restricting "political" items in polling buffer-zones, is unconstitutionally imprecise and overbroad, but not amendable to the saving express-advocacy construction. A Policy issued to explain what "political" means in the challenged provision actually exacerbates the imprecision and overbreadth of the challenged provision. And a proffered construction in Respondents brief opposing a grant of certiorari is grammatically and logically erroneous, in addition to introducing further imprecision and overbreadth. In sum, the challenged provision cannot be saved and should be held in violation of the First Amendment. *See* Part V.

Argument

I.

Buckley Established the Express-Advocacy Test to Cure Imprecision and Overbreadth.

In *Buckley*, 424 U.S. 1, this Court addressed similar constitutional problems and affirmed three controlling First Amendment doctrines: (A) regulation of campaign-related speech requires precise language to avoid chilling protected speech, especially issue advocacy; (B) intent-and-effects tests fail required precision; and (C)

the express-advocacy construction cures imprecision and overbreadth and limits regulation to campaign-related speech.

A. This Court Requires "Precision of Regulation," Including Special Protection Against Chilling Issue Advocacy.

In considering a vagueness challenge to a $1000 limit on expenditures "'relative to a clearly identified candidate,'" *Buckley*, 421 U.S. at 39 (quoting 18 U.S.C. § 608(e)(1) (1970)), this Court reaffirmed the necessity of "precision": "The test is whether the language of § 608(e)(1) affords the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms,'" 424 U.S. at 41 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). This Court held that the im-"precision" or "vagueness problem was threefold:

> In such circumstances [involving speech restriction], vague laws may not only [i] trap the innocent by not providing fair warning or [ii] foster arbitrary and discriminatory application but also [iii] operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

Id. at 41 n.48 (quotation marks and citations omitted).

The first two identified vagueness problems—(i) lack of notice and (ii) unfair enforcement—involve due-process protections. The third imprecision problem—(iii) the lack of precise definition and narrow tailoring that results in chilling protected speech—is uniquely protected against by the First Amendment: "'Because First Amendment freedoms need breathing

space to survive, government may regulate in the area only with narrow specificity.'" *Id.* at 41 n.48 (quoting *NAACP*, 371 U.S. at 433). And, *Buckley* held, First Amendment protection requires distinguishing protected issue advocacy from regulable express advocacy:

> [T]he distinction between *discussion of issues and candidates* and *advocacy of election or defeat of candidates* may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42 (emphasis added). Such a distinction, with protection clearly provided to issue advocacy by a bright-line test, is essential to "eliminate[] the problem of unconstitutional vagueness altogether." *Id.*

Because a construction of "'relative to' a candidate to ... mean 'advocating the election or defeat of' a candidate," did not solve this "distinction" problem, this Court rejected that construction as insufficient. *Id.* Rather, to establish the necessary "clear-cut distinction between discussion, laudation, general advocacy," on the one hand, versus "solicitation," on the other hand, *id.* at 43, this Court construed "§ 608(e)(1) ... to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44, which it called an "express words of advocacy" test:

> This construction would restrict the application of § 608(e)(1) to communications containing ex-

> press words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

Id. at 44 n.52.

Buckley applied the same express-advocacy construction, *id.* at 80, to a provision requiring disclosure of disbursements "'for the purpose of ... influencing' the nomination or election of candidates for federal office,'" *id.* at 74-75 (citation omitted), "[t]o insure that the reach of § 434(e) is *not impermissibly broad*," *id.* at 80 (emphasis added). And this Court applied the major-purpose test to assure that the disclosure provision would not "reach groups engaged purely in issue discussion" because "for the purpose of ... influencing' had "the same potential for encompassing both issue discussion and advocacy of a political result. *Id.* at 79. Here, *Buckley* makes clear that the problem at issue is not just vagueness, but also overbreadth, both resulting from the unconstitutional imprecision and lack of narrow tailoring.

From the foregoing it is clear that *Buckley* imposed a high standard for the "precision" (or "narrow specificity" or non-"vagueness") required in this area, both to prevent due-process concerns about notice and fair enforcement and to prevent overbreadth (lack of narrow tailoring) in provisions sweeping in issue advocacy while purporting to regulate "campaign" speech (*see* Part I.C regarding "campaign speech"). And it is also clear that though *Buckley* sometimes framed its analysis in terms of "vagueness," *id.* at 42—i.e., lack of "precision" or "narrow specificity," *id.* at 41 & n.48—that

"vagueness" concern also encompassed the *overbreadth* problem of sweeping in protected issue advocacy.[2]

That *Buckley* was dealing with the *overbreadth* of imprecise definition and tailoring, including sweeping in issue advocacy, is also clear from *MCFL*, 479 U.S. 238. *MCFL* applied the express-advocacy construction to a ban on corporate and union "expenditures *in connection with* any [federal] election." *Id.* at 248-49. *MCFL* said *Buckley* applied the express-advocacy test "to avoid problems of overbreadth," *id.* at 248, and "[t]he rationale for this holding was [that] '[the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application,'" *id.* at 249 (quoting *Buckley*, 421 U.S. at 42).

It is vital to note here that this *Buckley-MCFL* "overbreadth" sprang from imprecise definition and tailoring, including sweeping in issue advocacy, and did not turn on the substantial-overbreadth formula for

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[2] The Question Presented uses "overbroad" (Petrs.' Br. i), but as discussed above, *Buckley* makes overbreadth part of the im-"precision" *Buckley* called "vagueness," so "vagueness" or "imprecision" claims are proper here (*see, e.g.*, Petrs.' Br. 35, 46 n.17 (vagueness claims)), despite Respondents' assertion that Petitioners make no vagueness challenges (Opp'n 26 n.7). Anyway, because a First Amendment challenge has been made, and the First Amendment has its own "precision" or non-vagueness requirement, Petitioners may make any First Amendment argument they wish, including vagueness arguments. *See Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) ("'[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" (citations omitted)).

the type of First Amendment "overbreadth" described, e.g., in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), that essentially allows third-party standing. So there are two types of "overbreadth." They may fairly be described as "*Buckley*-overbreadth" and "*Broadrick*-overbreadth." Under *Buckley* and *MCFL*, the former is a result of imprecise definition and lack of tailoring that sweeps in issue advocacy and does not depend on *Broadrick*'s substantial-overbreadth formula. As applied here, restricting "political" items is overbroad because it fails *Buckley*'s precision mandate—both because "political" fails the due-process requirements of ensuring notice and fair enforcement and because it is not narrowly tailored, including for sweeping in issue advocacy, so that protected speech is chilled. Because it is overbroad under *Buckley*-overbreadth, arguments about "legitimate sweep" and substantiality of overbreadth are beside the point. That analysis belongs to *Broadrick*-overbreadth analysis.[3]

Because *Buckley*'s use of "vagueness" sprang from both due-process concerns (lack of notice and fair enforcement) and the imprecise-tailoring overbreadth of sweeping in issue advocacy, the term "imprecision" is used herein to describe *Buckley*'s "vagueness" concern (and that of *MCFL*). "Precision" is required in this most protected of First Amendment contexts, as *Buckley* reaffirmed, 421 U.S. at 41, and the term "imprecision" encompasses both reasons why that is so.

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[3] The challenged provision would also fail *Broadrick*-overbreadth because the sweep of "political" is vast, reaching far beyond speech that might be regulable under any cognizable supporting interest.

B. This Court Rejects "Intent and Effect" Speech Tests.

In describing the required "precision" and the problem of distinguishing express advocacy from issue advocacy absent the express-advocacy test, *Buckley* expressly rejected "'intent and ... effect'" tests because they "'put[] the speaker ... wholly at the mercy of the ... varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" 424 U.S. at 43 (citation omitted).

This rejection of intent-and-effect tests was reaffirmed in *WRTL-II*, 551 U.S. at 465-69 (2007) (plurality opinion[4]), which noted (inter alia) that "*Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates," *id.* at 467. Moreover, *WRTL-II* noted, *McConnell*[, 540 U.S. 93),] did not purport to overrule *Buckley* on this point—or even address what *Buckley* had to say on the subject." 551 U.S. at 467.

As discussed in Part V, no intent-and-effect test or construction is permissible in this case.

C. *Buckley*'s Express-Advocacy Test Also Restricts Regulation to "Campaign" Activity.

Early in the *Buckley* opinion, this Court recognized that "[t]he constitutional power of Congress to regulate federal elections" is based on "Article I, § 4, of the Constitution[, which] grants Congress the power to regulate elections of members of the Senate and House of Representatives." 421 U.S. at 13 & n.16. Consequently, all regulated activity in the "Federal Election Cam-

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[4] This controlling opinion states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

paign Act ... and related provisions of the Internal Revenue Code," *id.* at 6, had to be closely and clearly related to regulating elections. So the *Buckley* Court took great care to assure such close relation at several pertinent points. Three are discussed here.

First, this Court imposed the express advocacy construction on "relative to a ... candidate" in an expenditure limitation to distinguish expenditures for issue advocacy from "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. *See* Part I.A. The express-advocacy test not only solved the imprecision and overbreadth problems discussed above, it also confined Congress to its authority to regulate only campaign-related activity.

Second, this Court emphasized that it was restricting Congress to its authority when construing "the phrase, 'for the purpose of ... influencing' an election or nomination, [which] ... shares the same potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. This Court actually did two constructions, regarding this purpose-of-influencing phrase. The first had to do with the disclosure requirements of "political committees," which this court narrowed with the major-purpose test to groups that were "campaign related" as follows:

> "political committee" ... could be interpreted to reach *groups engaged purely in issue discussion.* The lower courts have construed the words "political committee" more narrowly. [footnote omitted] To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candi-

> date. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related.*

Id. at 79 (emphasis added).

Third, this Court then applied the express-advocacy construction to the purpose-of-influencing phrase for other entities to assure that it reached only "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 81. The Court first noted a Senate Report that said the provision's goal was "'total disclosure' by reaching 'every kind of *political* activity.'" *Id.* at 76 (citations omitted) (emphasis added). Because regulating all "political activity" is obviously overbroad, *Buckley* first narrowed the goal by saying that Congress really sought to regulate just "political *campaign* financing" and *"campaign*-oriented spending." *Id.* at 77 (emphasis added). And as that remained imprecise and overbroad, this Court then imposed the express-advocacy test:

> But when the maker of the expenditure is ... an individual other than a candidate or a group other than a "political committee" [,] *the relation of the information sought to the purposes of the Act may be too remote.* To insure that the reach of § 434(e) is *not impermissibly broad,* we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e) to reach only funds used for communications that expressly advocate [footnote omitted] the election or defeat of a clearly identified candidate. This reading is directed precisely to

> that spending that is *unambiguously related to the campaign of a particular federal candidate.*

Id. at 79-80 (emphasis added). This Court reiterated that, as construed, the purpose-of-influencing phrase and disclosure provision "shed the light of publicity on spending that is *unambiguously campaign related.*" *Id.* at 81 (emphasis added).

As discussed in Part V, *Buckley*'s rejection of the phrase "political activity" as an imprecise and overbroad definition for regulating speech and election-related activity means that the "political" definition at issue here must fail.

II.
Burson Involved "Campaign Materials" and "Solicitation," Not "Political" Materials and "Issue" Advocacy.

Buckley's focus on restricting election-related laws to those that are "unambiguously *campaign* related" in the expenditure-restriction, political-committee-definition, and disclosure contexts, *see* Part I.C, gives meaning to the later use of the term "campaign" in *Burson*, 504 U.S. 191. *Burson* noted that Tennessee "prohibits the solicitation of votes and the display of campaign materials within 100 feet of the entrance of a polling place," which *Burson* called a "campaign-free zone." *Id.* at 193 (plurality[5]). The statute barred "'campaign materials[] and solicitation of votes,'" including for ballot issues. *Id.* at 193-94 (citation omitted). *See also id.* at 223 (Stevens, J., joined by O'Connor and Souter, JJ., dissenting) ("Within the zone, [the challenged ban] si-

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[5] This controlling opinion states the holding. *Marks*, 430 U.S. at 193.

lences all campaign-related expression, but allows expression on any other subject: religious, artistic, commercial speech, even political debate and solicitation concerns issues or candidates not on the day's ballot.") And in *Burson*, the term "campaign" would have been understood by this Court in light of this Court's "campaign" references in *Buckley*, given that they involve the same election-law context. So *Burson* approved removal of unambiguously-*campaign*-related activity from a polling area on election day—nothing more.

Burson provides no authority for banning anything beyond activities that are unambiguously campaign related, such as express-advocacy communications and candidate-committee campaign materials. Specifically, *Burson* provides no support for banning "political" materials and issue advocacy, which are at issue here.

III.
McConnell Left the Express-Advocacy Test Intact for Eliminating Imprecision and Overbreadth.

McConnell discussed *Buckley*'s express-advocacy constructions as needed "to avoid problems of vagueness and overbreadth," 540 U.S. at 192, and it said "we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line," *id.* That left intact the express-advocacy construction as this Court's cure for imprecision and overbreadth in the election-law context.

McConnell returned to the no-vagueness theme at the end of its discussion of the electioneering-communication definition, highlighting the required precision:

> Finally we observe that the new ... definition of "electioneering communication" raises none of

> the vagueness concerns that drove our analysis in *Buckley*.[6] The term ... applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.

Id. at 194. For present purposes, *McConnell* left intact (indeed recognized) the express-advocacy construction as this Court's saving construction for imprecise and overbroad election-law provisions. In keeping with

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[6] *McConnell*'s statement that *Buckley*'s constructions were a result of "vagueness" alone overlooks its own recitation of the express-advocacy test as being used "to avoid problems of vagueness *and overbreadth*," *id.* at 192 (emphasis added) as well as (i) *Buckley*'s emphasis on avoiding an overbroad sweep that captures issue advocacy, (ii) *Buckley*'s limitation of regulation to unambiguously-campaign-related activity, and (iii) *MCFL*'s statement that *Buckley*'s express-advocacy constructions were to eliminate "overbreadth." *See supra* Part I. Numerous lower courts, including every circuit court to consider the issue, understood *Buckley*'s and *MCFL*'s express-advocacy constructions as including a substantive First Amendment mandate to avoid chilling issue advocacy. *See* James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining* McConnell*'s Exception to* Buckley*'s General Rule Protecting Issue Advocacy*, 31 N. Ky. L. Rev. 289, 295 n.36 (2004) (collecting cases).

Buckley, *MCFL*, and *McConnell*,[7] Part V will address possible applications of that construction.

IV.

Post-*McConnell*, Circuit Courts Use the Express-Advocacy Test to Cure Imprecision and Overbreadth.

After *McConnell*, three circuit courts have recognized that *McConnell* left intact the ability of courts to use the express-advocacy construction to cure provisions that are imprecise and overbroad.

First, the Sixth Circuit led the way in *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004). *Anderson* has special relevance here because it addressed "whether Kentucky's restriction of electioneering within 500 feet of polling places ... is unconstitutionally overbroad." *Id.* at 656 (capitalization altered). Both the "500-foot buffer zone" and "the definition of electioneering" were challenged as "overbroad," the latter for "includ[ing] political speech that does not expressly advocate the election or defeat of candidates for public office." *Id.* at 656.

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[7] *McConnell*'s emphasis on the need for the sort of non-vagueness found n the "electioneering communication" definition in itself dooms the less-precise "political" definition here. Moreover, *WRTL-II* created an "appeal to vote" test to define the "functional equivalent of express advocacy," 551 U.S. at 469-70 (controlling opinion) ("[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."), that is more precise than "political," though that "appeal to vote" test no longer functions after the underlying provision was held unconstitutional in *Citizens United*, 558 U.S. at365-66.

The Sixth Circuit first noted that the seminal *Buckley* decision, as explained by *McConnell*, established "the difference between express advocacy and issue advocacy." *Id.* at 663. The Sixth Circuit cited *McConnell* for the fact that—in considering "the vague requirement of being "relative to a clearly identified candidate'"—"the Court was confronted with a substantial statutory vagueness and overbreadth issue." *Id.* (citation omitted). The Sixth Circuit highlighted the fact that the construction was to avoid the overbreadth of sweeping in issue advocacy with a bright-line test:

> If the Court did not circumscribe the term "relative to," the regulation could apply to broad categories of issue-related speech, which may or may not have any relation to the election or defeat of specific candidates. *In order to avoid overbreadth*, the Court utilized a bright-line rule, and found that "relative to" referred only to expenditures using terms of express advocacy .... By offering a narrowing construction, the Supreme Court interpreted the statute to avoid more protected speech than is necessary to prevent corruption.

Id. at 663-64 (emphasis added; citations omitted).

The Sixth Circuit noted that *McConnell* said that the electioneering-communication definition was not vague so "the Court found that the express advocacy distinction was not necessary," and that the express-advocacy and issue-advocacy distinction was "functionally meaningless,'" and it noted that "the *McConnell* court disavowed the theory that "'the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.'" *Id.* (citations omitted). But, the

Sixth Circuit continued, the express-advocacy test remains a vital tool to avoid vagueness and overbreadth:

> [*McConnell*] nonetheless left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest. And *McConnell* in no way alters the basic principle that the government may not regulate a broader class of speech than is necessary to achieve its significant interest.

Id. at 664-64. The court noted that Kentucky's "vague" statute, which swept in "'the displaying of signs, the distribution of campaign literature, cards, or handbills," could be interpreted as limited to express advocacy," but

> the Kentucky State Board of Elections has chosen a broader—indeed an overbroad—interpretation ... in finding that instructions on how cast an absentee ballot constitute electioneering. Also, unlike, *McConnell*, the record is devoid of evidence that such a broad definition is necessary to achieve the State's interest in preventing corruption—or, to use *McConnell*'s words, that an express advocacy line would be "functionally meaningless" as applied to electioneering proximate to voting places.

Id. at 665 (citation omitted). Consequently, the court applied the express-advocacy construction:

> The reasoning of *Buckley*, *McConnell*, *Schirmer*,[8] and *Burson* suggests that a prophylactic restriction which extends to issue advocacy—that is, protected speech which does not directly seek to elect or oppose specific candidates—cannot be maintained unless the state demonstrates that the limitation was necessary to prevent intimidation and election fraud. Because Kentucky has failed to demonstrate that interest here, we apply a narrowing construction to the term "electioneering," and find that it may permissibly apply only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure.

Id. at 665.

Second, the Fifth Circuit cited *Anderson* and followed its analysis in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 663-66 (5th Cir. 2006). At issue in *Carmouche* was a First Amendment challenge to the term "expenditure" in Louisiana's Campaign Finance Disclosure Act ("CFDA"), which was challenged as unconstitutionally vague and overbroad. *Id.* at 658, 663. "Expenditure" was defined to reach "anything of value made for the purpose of influencing the nomination or election of a person to public office. *Id.* at 663. The government claimed that *Buckley* upheld a for-the-purpose-of-influencing definition of expenditure, so it was not unconstitutional. The Fifth Circuit held: "We agree, but only by imposing the same limit-

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[8] In *Louisiana v. Schirmer*, 646 So. 2d 890, 901 (La. 1994), "the Louisiana Supreme Court ... appl[ied] something like an issue advocacy/express advocacy distinction." *Anderson*, 356 F.3d at 664.

ing construction on the CFDA that the Court employed in *Buckley*." *Id.* The court cited *Anderson*'s holding that "*McConnell* does not obviate the applicability of *Buckley*'s line-drawing exercise where, as in this case, we are confronted with a vague statute." *Id.* at 665 (citation omitted). It said that "[*McConnell*] has stated that *legislatures* may employ standards other than a bright-line distinction between express and issue advocacy as long as they are precise ...." *Id.* (emphasis in original). And so, the court decided to apply the express-advocacy test to cure the vague for-the-purpose-of-influencing definition of "expenditure":

> The flaw in the CFDA is that it *might* be read to cover issue advocacy. Following *McConnell*, that uncertainty presents a problem not because regulating such communications is *per se* unconstitutional, but because it renders the scope of the statute uncertain. To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle to the CFDA and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate. In limiting the scope of the CFDA to express advocacy, we adopt *Buckley*'s definition of what qualifies as such advocacy.

Id. The court then explained that *Buckley*'s express-words-of-advocacy definition controls for such purposes—despite *McConnell*'s context-specific statements about the tests inadequacies—because "*Buckley* remains good law in such circumstances" since *McConnell* was silent "about the continuing relevance of the magic words requirement as a tool of statutory con-

struction where a court is dealing with a vague campaign finance regulation." *Id.* at 665 n.7.

Third, the Ninth Circuit cited *Anderson* in agreeing that *McConnell* "left intact" the express-advocacy construction to curing vagueness and overbreadth:

> [A]s stated recently by the Sixth Circuit, *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.

American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 985 (9th Cir. 2004) (citation omitted). But, the Ninth Circuit noted, "[f]ederal courts are 'without power to adopt a construction of a state statute unless such a construction is reasonable and readily apparent.'" *Id.* at 986 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000)). And it decided that the statute was not amenable to a saving strict-scrutiny construction. *Id.* The statute required "certain groups or entities publishing 'any material or information relating to an election, candidate or any question on a ballot" to reveal *on the publication* the names and addresses of the publication's financial sponsors." *Id.* at 981 (emphasis in original). The court noted that the statute had no "advocacy" language because it "applie[d] to 'information,' not a term that suggests any kind of exhortation to action." *Id.* at 986. And the statute "applie[d] to 'material or information *relating to* an election, candidate or any question on the ballot," so that it "reache[d] objective publications that concern any aspect" of the

foregoing, including "discussions of election procedures, analyses of polling results, and nonpartisan get-out-the-vote drives ...." *Id.* "Further, other provisions ... make clear that the Legislature explicitly uses language to indicate a limitation to advocacy speech when it intends such limitation," the court continued, and it concluded it could neither impose a saving express-advocacy construction or certify a construction question to the state supreme court. *Id. Heller* subsequently held the provision unconstitutional under *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

In sum, three circuit courts have recognized that post-*McConnell* the express-advocacy construction may be imposed on imprecise and overbroad election-related provisions to save them from unconstitutionality—but only where construction of a state statute is reasonable and readily apparent. As discussed in Part V, these cases provide valuable guidance in the present case.

V.

The Foregoing Doctrines Prove the Provision, Policy, and Proffered Construction Unconstitutional.

The foregoing doctrines govern the First Amendment analysis of (A) the challenged provision; (B) the Policy interpreting "political"; and (C) the limiting construction proffered in Respondents' Joint Brief in Opposition ("Opp'n").

A. The Challenged Provision Is Unconstitutional and Not Amendable to a Saving Construction.

The challenged provision is the third sentence of Minnesota Statute Section 211B.11(1), which provides: "A political badge, political button, or other political insignia may not be worn at or about the polling place

on primary or election day." The term "political" is imprecise and overbroad and not readily susceptible to a saving construction.

As noted above, *supra* Part I.A, *Buckley* began construing a purpose-of-influencing phrase (in a catch-all disclosure provision) by noting a Senate Report that said the was goal was "'total disclosure' by reaching 'every kind of *political* activity.'" 424 U.S. at 76 (citations omitted) (emphasis added). But since "political activity" was obviously overbroad, *Buckley* first narrowed the goal by saying that Congress really sought to regulate just "political *campaign* financing" and "*campaign*-oriented spending." *Id.* at 77 (emphasis added). But that didn't solve the imprecision and overbreadth problem because the Court then had to impose the express-advocacy test to prevent imprecision and overbreadth as to individuals. Because *Buckley* rejected "political" in favor of "campaign-oriented" when construing the goal of a federal statute, and then further required the narrowing express-advocacy construction to save it from imprecision and overbreadth—and because "political" is not "campaign" and express-advocacy is not required—the challenged provision is unconstitutionally imprecise and overbroad. (And as discussed in Part V.C, the proffered saving construction—premised on the tacit acknowledgment that the term "political" standing alone is unconstitutional—also fails.)

The challenged provision is not amenable to a saving construction. As the Ninth Circuit noted in *Heller*, 378 F.3d at 985, "[f]ederal courts are 'without power to adopt a construction of a state statute unless such a construction is reasonable and readily apparent.'" *Id.* at 986 (quoting *Stenberg*, 530 U.S. at 944). No con-

struction is reasonable and readily apparent here, as Petitioners assert. (Petrs.' Br. 16.) This is so for at least two reasons.

First, as *Heller* noted, if the Legislature shows it can plainly address a topic in one provision, but does not in another, the second can't be read to mean what the first means. 378 F.3d at 986 (dealing with other provisions addressing advocacy). Here "political" can't be construed as limited to "campaign-related" because, as Petitioners note, "[t]he first sentence of Section 211B.11(1) forbids active campaigning at polling places" by banning "'campaign material ... or in any manner try[ing] to induce or persuade a voter ....'" (Petrs.' Br. 4.) The first sentence of § 211B.11(1) showed that the legislature knows how to use "campaign" and to use advocacy language. So "political" can't reach only "campaign-related" activity, have advocacy language imported, and be saved by an express-advocacy construction.

Second, as *Heller* also noted, where a state-law provision addresses no "advocacy," imposing an express-advocacy construction on it is not proper. 378 F.3d at 986. In the third sentence of § 211B.11(1), unlike the first sentence, there are no words of advocacy, so by its terms it doesn't regulate advocacy. And while the ability of federal courts to construe federal laws is much greater than their ability to impose (nonbinding) constructions on state statutes, *Buckley* and *MCFL* at least had relative-to, for-the-purpose-of-influencing, and in-connection-with language as a starting point for an express-advocacy saving construction. No such language occurs in the challenged provision.

So the challenged provision is both unconstitutionally imprecise and overbroad and not amenable to a

saving, express-advocacy construction. It should be held unconstitutional under the First Amendment.

B. The Interpretive Policy Is Unconstitutional.

An Election Day Policy ("Policy") interprets § 211B. 11(1) to reach "'political badges ... or other political insignia *or* displaying campaign materials at the polling place,'" with what is "political" determined by election judges.[9] (Petrs.' Br. 7 (citation omitted) (emphasis added by Petrs.' Br.).) The Policy provides the following non-limiting examples of "political":

- Any item including the name of a political party ....
- Any item including the name of a candidate at any election.
- Any item in support of or opposition to a ballot question at any election.
- [Any] [i]ssue oriented material designed to influence or impact voting ....
- [Any] [m]aterial promoting a group with recognizable political views ....

(Petrs.' Br. 8 (citation omitted).) But "political" remains imprecise and overbroad for at least five reasons.

First, "political" materials are clearly distinguished from "campaign" materials, so the former cannot be construed to be limited to the latter.

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[9] Granting election judges discretion to determine what is "political" is especially troubling as being an election judge requires no expertise in First Amendment or statutory construction doctrines. So such discretion should only be entrusted where there is an extremely bright-line test, such as *Buckley*'s express-words-of-advocacy test, but "political" is not amenable to that construction.

Second, mere description of certain political materials does not resolve the First Amendment imprecision and overbreadth of "political."

Third, the phrase "support of or opposition to" introduces advocacy language, but it falls short of the required precision of the express-advocacy test. It is imprecise and overbroad for the same reason that *Buckley* rejected the formulation "'advocating the election or defeat of' a candidate," because it lacked the required precision of the express-words-of-advocacy test. 421 U.S. at 42-44. And such advocacy language is absent from the third sentence of § 211B.11(1), so the authority (if any) for this advocacy language must derive from the non-challenged first sentence, not the third.

Fourth, "[i]ssue oriented material designed to influence or impact voting" both introduces issue advocacy that *Buckley* and *MCFL* protected and relies on two tests that have been expressly rejected as unconstitutional. One test is brought in by the word "designed," which introduces an intent-and-effect test that has been expressly rejected at least twice by this Court. *See supra* Part I.B. The other test, brought in by the phrase "designed to influence," introduces a for-the-purpose-of-influencing test, which is precisely what *Buckley* held to be vague and overbroad absent the express-advocacy test, 421 U.S. at 44, to which the challenged provision here is not amenable. *See supra* Part V.A. And the phrase "or impact" introduces a term that is plainly vague and overbroad because "designed to ... impact" is less precise than the already rejected for-the-purpose-of-influencing test. Moreover, "impact" could never be cabined, given the ability of most anything to "impact" elections. So though the foregoing

introduces advocacy terms (absent from the challenged third sentence), none is constitutional.

Fifth, "[any] [m]aterial promoting a group with recognizable political views" introduces an advocacy term, "promoting," that is absent from the challenged third sentence, but it is more vague and overbroad than the already rejected for-the-purpose-of-influencing test.[10] And the notion of promoting "group[s] with recognizable political views"—including the imprecision of both "recognizable (which is akin to a forbidden effect test, depending on audience perception) and "political"—is so imprecise and overbroad that it would be impossible to cabin, reaching far beyond regulatory norms in the highly protected First Amendment realm. It could sweep in even clothing brand names and logos where manufacturers have taken "political" positions, which happens routinely and widely in today's political climate. For example might a potential voter be rejected by some election judge for wearing Converse All Star sneakers to the poll because Converse affirms its values of "diversity," "sustainability," and being "global citizens"? *See Converse Values*, https://jobs.converse.com/about (providing video link). Surely those could be perceived by some election judge as recognizable politi-

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[10] *McConnell* held that a requirement that federal political parties use "federal funds" for communications that "promote," "attack," "support," or "oppose" a clearly identified federal candidate was not vague, but that was justified in large part because "actions taken by political parties are presumed to be in connection with election campaigns." 540 U.S. at 170 n.64. No such presumption or sophisticated political actor is at issue here to justify "promotes."

cal values of a group, making such sneaker wearers excludable from polls and buffer-zones.

In sum, the Policy purporting to interpret "political" actually exacerbates the unconstitutionality of "political," rather than saving the challenged provision from unconstitutional imprecision and overbreadth. And it shows that the challenged provision is not amenable to a saving construction because the Policy's descriptions of what "political" means are themselves unconstitutionally imprecise and overbroad.

C. The Proffered Construction Is Unconstitutional.

In tacit recognition of the unconstitutionality of the term "political" standing alone (or as described in the Policy), Respondents offered a construction in an attempt to save "political":

> The prohibition on wearing "political" paraphernalia ... has a common-sense understanding. *See* Minn. Stat. § 211B.01, subd. 6 (2016) ("An act is done for 'political purposes' when the act is intended or done to influence, directly or indirectly, voting at a primary or other election."

(Opp'n 27.)

Of course, the cited provision, § 211B.01 ("Definitions"), provides applicable definitions, including of "campaign material"[11] and "political purposes." But the

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[11] To the extent "campaign material" is used in an attempt to define "political," the former is also unconstitutionally imprecise and overbroad because it includes "any ... material that is disseminated for the purpose of influencing voting," Minn. Stat. § 211B.01, subd. 2, and purpose-of-influencing test have been held unconstitutionally imprecise

word "political" is used in the challenged third sentence of § 211B.11(1), not the phrase "political purposes" from the definitions. "Political" and "political purpose" are not the same. "Political" itself is undefined. In the challenged provision, "political" modifies things—a "badge," "button," or "insignia," not one's "purpose." A political purpose is grammatically and conceptually distinguishable from a political badge, button, or insignia, which makes the attempted importation of "political purpose" to define "political" improper. For example, a "political badge" is not an "act," as the "political purpose" definition envisions. Badges, buttons, and insignias can't "act" for political purposes or otherwise. Moreover, "political purpose" is defined with a forbidden intent-and-effect test ("done for" and "intended or done to") that is coupled with a purpose-of-influencing test (held unconstitutionally imprecise and overbroad since *Buckley*), both further blurred by a "directly or indirectly" qualifier that introduces further imprecision and overbreadth. So the proffered construction doesn't save the challenged provision from unconstitutional imprecision and overbreadth.

Conclusion

As shown, the challenged provision is unconstitutionally imprecise and overbroad. And it is not amenable to *Buckley*'s approved express-advocacy construction. The Policy and proffered construction exacerbate the imprecision and overbreadth of "political." Consequently, the challenged provision should be held facially unconstitutional under the First Amendment.

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and overbroad since *Buckley*. *See supra* Part I.A.

Respectfully submitted,

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No. 16-1435

In the Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, *et al.*,
Petitioners,

v.

JOE MANSKY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Justice and Freedom Fund ("JFF"), as *amicus curiae*, respectfully urges this Court to reverse the decision of the Eighth Circuit.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Minnesota has enacted a content-based statute restricting core political speech. Minn. Stat. § 211B.11(1). This law cannot withstand even minimal constitutional scrutiny, regardless of forum classification. There are several serious flaws.

First, the statute and the Election Day Policy promulgated by election officials both contain wildly imprecise language. Unlike *Burson v. Freeman*, 504 U.S. 191 (1992), which limited "campaign" activities (*id.* at 193-194, quoting Tenn. Code Ann. § 2-7-111(b)), Minnesota sweeps in boundless "political" expression, whether or not related to the current ballot. Such imprecision grants officials discretion to place roadblocks in the path of voters who express viewpoints they dislike.

Second, the rights of *voters* are the chief reason for campaign restrictions at the polls. The Tennessee statute in *Burson* restricted a particular class of speakers—campaign workers, not voters. Instead of protecting voters, Minnesota's regulation infringes their rights, both to vote and to express themselves in a peaceful, non-disruptive manner.

Finally, this case is about *passive*, non-verbal expression (t-shirts, buttons), not the *active* expression at issue in *Burson* (distribution of campaign materials or solicitation of signatures). There is only a tenuous link between the Minnesota regulation and the intimidation, coercion, and election fraud that polling restrictions are designed to prevent.

ARGUMENT

I. THE STATUTE IS A CONTENT-BASED RESTRICTION ON CORE POLITICAL SPEECH THAT GRANTS EXCESSIVE DISCRETION TO OFFICIALS AND CREATES AN UNREASONABLE RISK OF VIEWPOINT DISCRIMINATION.

Like the statute at issue in *Burson*, Minn. Stat. § 211B.11(1) "implicates . . . central concerns in our First Amendment jurisprudence," including the "regulation of *political* speech . . . based on the *content* of the speech." *Burson*, 504 U.S. at196 (emphasis added). Political speech is unquestionably at the core of the First Amendment. "[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). "[D]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

The government may not restrict speech because of "its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Minnesota has enacted an admittedly "content-based regulation because it only prohibits badges, buttons, and insignia with a political message." *Minn. Majority v. Mansky*, 789 F. Supp. 2d 1112, 1120 (D. Minn. 2011). It applies to all viewpoints but censures "an entire topic"—political speech. *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537

(1980); *Burson*, 504 U.S. at 197; *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2223 (2015).

A. The Statute Is Imprecise, Granting Officials Broad Discretion To Determine What Is "Political" And Turn Voters Away.

In today's politically polarized atmosphere, legislators must guard against overstepping constitutional bounds. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Minnesota's broad regulatory scheme is a prime example of the imprecision that characterizes many state laws regulating speech at the polls. It sweeps in benign, passive expression. Instead of choosing "a less drastic way of satisfying its legitimate interests," Minnesota has enacted "a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973).

Virtually all states apply some restrictions around polling places. Terminology varies. Many use the word "electioneering," but definitions and breadth vary widely.[2] Some states, as in *Burson*, use the term

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[2] Ar. Code Ann. § 7-1-103(a)(9)(A); Del. Code Ann. tit.15, § 4942(d) (includes wearing items referring to "issues" or "partisan topics," and "political discussion of issues" as well as candidates or "partisan topics"); D.C. Code § 1-1001.10(b)(1)(2)(A); Idaho Code § 18-2318(1); 10 Ill. Comp. Stat. § 5/17-29(a) ("electioneering or soliciting of votes or engaging in any political discussion"); 10 Ill. Comp. Stat. § 5/7-41(c); Ind. Code Ann. § 3-14-3-16 (extends to clothing, buttons); Iowa Code § 39A.4(1)(a)(1); Md. Elec. Law Code

"campaign."[3] Other states, like Minnesota, employ the term "political."[4] A few of these states utilize both "campaign" and "political."[5] Other states use more general language,[6] or even loitering laws.[7]

Ann. § 16-206(a)(10); Neb. Rev. Stat. § 32-1524(2); N.M. Stat. Ann. § 3-8-77A; N.Y. Elec. Law § 8-104; Okl. Stat. tit. 26, § 7-108; Or. Rev. Stat. § 260.695(2) ("electioneering need not relate to the election being conducted"); 25 Pa. Cons. Stat. Ann. § 3060(c); Utah Code Ann. § 20A-3-501(2)(a) (oral, printed, or written); Wyo. Stat. § 22-26-113 ("any form of campaigning"); Wis. Stat. § 12.03 ("any activity which is intended to influence voting at an election").

[3] Ar. Code Ann. § 7-1-103(a)(9)(A); Me. Rev. Stat. tit. 21-A, § 682; D.C. Code § 1-1001.10(b)(1)(2)(A); Fla. Stat. § 102.031(4); Ga. Code Ann. § 21-2-414(a); Haw. Rev. Stat. § 11-132(d); Kan. Stat. Ann. § 25-2430(a); La. Stat. Ann. § 18:1462(A)(3); Md. Elec. Law Code Ann. § 16-206(a)(10); N.H. Rev. Stat. Ann. § 659:43(I); N.M. Stat. Ann. § 3-8-77A; N.C. Gen. Stat. § 163A-1134; Ohio Rev. Code § 3501.35(A)(1); S.C. Code Ann. § 7-25-180; S.D. Codified Laws § 12-18-3; Tenn. Code Ann. § 2-7-111(b)(1) (upheld in *Burson*); Vt. Stat. Ann. tit. 17, § 2508; Va. Code Ann. § 24.2-604(D); Wyo. Stat. § 22-26-113 (also regulates "electioneering").

[4] Alaska Stat. § 15.56.016(a)(2)(B); Fla. Stat. § 102.031(4); N.J. Stat. Ann. § 19:34-19; N.Y. Elec. Law § 8-104 ("political banner, button, poster, placard"); N.C. Gen. Stat. § 163A-1134; R.I. Gen. Laws § 17-19-49; S.C. Code Ann. § 7-25-180; Vt. Stat. Ann. tit. 17, § 2508.

[5] Fla. Stat. § 102.031(4); N.C. Gen. Stat. § 163A-1134 (campaign literature and political advertising); S.C. Code Ann. § 7-25-180 (campaign literature and political posters); Vt. Stat. Ann. tit. 17, § 2508 (campaign literature and political materials).

[6] Conn. Gen. Stat. § 9-236(a); Mass. Gen. laws ch. 54, § 65; Mich. Comp. Laws § 168.744(3) ("post, display, or distribute" any material that "directly or indirectly makes reference to an election, a candidate, or a ballot question"); Miss. Code Ann. § 23-17-55

Some states—but not Minnesota—use broad terms like "political" or "campaign" but restrict the reach of their statutes to the candidates, political parties, and measures that are on the ballot.[8] These criteria help curb the potential for unbridled discretion.

The bare term "political," without a limiting definition or other guidance, is highly susceptible to improper discretion. The District Court admitted to "the potential for innumerable issues to become political . . . because of an ongoing national debate, local controversy, or relevance to an issue or candidate on the ballot." *Minn. Majority*, 789 F. Supp. 2d at 1128. The statute "does not include a definition of political" (*id.* at 1125) yet the court determined it was "easily understood" and "not vague" (*id.* at 1126). Definitions for "political badge, political button, or other political insignia" were left to election judges, who drafted an Election Day Policy using examples they admit are not all-inclusive:

("unlawful . . . to distribute or post material in support of or in opposition to a measure" within the defined area); Rev. Code Wash. (RCW) § 29A.84.510(1).

[7] Code of Ala. § 17-9-50; Iowa Code § 39A.4(1)(a)(1); Ohio Rev. Code § 3501.35(A)(1); W. Va. Code § 3-1-37(a).

[8] Alaska Stat. § 15.56.016(a)(2)(B) ("political"); Ar. Code Ann. § 7-1-103(a) (9) (A) ("campaign"); Ar. Code Ann. §§ 16-411(H), 16-515(I); Cal. Elec. Code §§ 18370, 319.5; Colo. Rev. Stat. 1-13-714(1); Conn. Gen. Stat. § 9-236(a); Kan. Stat. Ann. § 25-2430(a) ("campaign"); Me. Rev. Stat. tit. 21-A, § 682 ("campaign); Mo. Rev. Stat. § 115.637(18); Mont. Code Ann. § 13-35-211(3); Nev. Rev. Stat. § 293.740; N.D. Cent. Code § 16.1-10-06 (prior version of this statute was found too broad in *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D. N.D. 2012)); R.I. Gen. Laws § 17-19-49 ("political").

- Any item including the name of a political party in Minnesota, such as Republican, DFL, Independence, Green, or Libertarian parties.
- Any item including the name of a candidate *at any election*.
- Any item in support of or opposition to a ballot question *at any election*.
- *Issue oriented material* designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).
- Material promoting a *group with recognizable political views* (such as the Tea Party, MoveOn.org, and so on).

Id. at 1118 (emphasis added). The possibilities are endless. These "vague limiting construction[s] . . . give [election] officials alone the power to decide in the first instance whether a given activity is [political]." *Bd. of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 576 (1987). Does "any election" include past and/or future elections? Would "group[s] with recognizable political views" sweep in religious or other organizations with convictions about contentious issues like abortion? What about satire, or past political slogans slightly altered ("Make America ____ Again")? Such lack of clarity "compel[s] the speaker to hedge and trim" (*Thomas v. Collins*, 323 U.S. 516, 535 (1945)), perhaps by wearing plain clothing with no messages, lettering, pictures, or even colors that might identify a political party or ideology. Even when voters display lettering unrelated to any political issue or campaign, there can still be confusion. In 2012, poll workers in Colorado and Florida banned student voters wearing Massachusetts Institute of Technology (M.I.T.) sweatshirts, confusing "M.I.T." with candidate Mitt

Romney. James J. Woodruff II, *Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much*, 65 Mercer L. Rev. 331, 332 n. 5, 366 n. 270, 367 n. 271-273 (Winter 2014).

Minnesota's use of the term "political" contrasts with Tennessee's use of the more limited word "campaign" in the statute this Court upheld in *Burson*. That statute provides in relevant part:

> Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of *campaign* posters, signs or other *campaign* materials, distribution of *campaign* materials, and solicitation of votes for or against any person or political party or position on a question are prohibited.

Burson, 504 U.S. at 193-94 (emphasis added) (quoting Tenn. Code Ann. § 2-7-111(b) (Supp. 1991)). This Court emphasized that *Burson* was a "rare case." *Id.* at 211. It does not support a ban on voters wearing "political insignia" to the polls. *See Minn. Majority v. Mansky*, 708 F.3d 1051, 1061-62 (8th Cir. 2013) (Shepherd, J., dissenting). As this Court explained, "[w]hether individuals may exercise their free speech rights near polling places [under the Tennessee statute] depends entirely on whether their speech is related to a political *campaign*." *Id.*, quoting *Burson*, 504 U.S. at 197 (emphasis added). Moreover, as Justice Stevens observed in his dissent, the Tennessee statute "silences all campaign-related expression, *but allows expression on any other subject*: religious, artistic, commercial speech, *even political debate and solicitation concerning issues or candidates not on the day's ballot*." *Minn.*

Majority v. Mansky, 708 F.3d at 1061-62 (Shepherd, J., dissenting), quoting *Burson*, 504 U.S. at 223 (Stevens, J., dissenting) (emphasis added). Commentators have noted the potential abuse inherent in the term "political material" as contrasted with "campaign material," including "the name of a religious school" or common phrases such as "God Bless America," "Live Free or Die," and "Support Our Troops." *Freedom of Speech & Election Day*, 65 Mercer L. Rev. at 346 n. 120, 121. Even the colors red and blue, associated with the two major political parties, could be swept in. *Id.* at n. 122.

The broad language of Minnesota's Election Day Policy also captures "issue oriented material designed to influence or impact voting," with the "Please I.D. Me" buttons as an example. "Issue advocacy conveys information and educates." *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007). But "what separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.*, at 499 (internal citations and quotation marks omitted). Candidates and issues are often intertwined, and "laws targeting political speech are the principal object of the First Amendment guarantee." *Id.* at 494. The blurred line between political and issue advocacy "is an indictment of the statute, not a justification of it." *Id.* Adding "issue oriented material" to the list of prohibitions only heightens the constitutional flaws.

B. Forum Analysis Does Not Salvage The Statute.

Challenges to Election Day speech restrictions often turn on the nature of the forum. Litigants are more likely to succeed in a public forum. "The Constitution abhors the misuse of discretion as a license for arbitrary procedure. . . . . None of the training manuals give a precise definition of 'electioneering.'" *Reed v. Purcell*, 2010 U.S. Dist. LEXIS 121207, *9 (D. Ariz. 2010) (public forum) (granting temporary restraining order). In a nonpublic forum, challenges are more likely to fail, e.g., *Marlin v. D.C. Bd. Of Elections & Ethics*, 236 F.3d. 716, 718 (D.C. Cir. 2000) (nonpublic forum) (unsuccessful challenge to Board's broad definition of "political activity").

But forum analysis is not conclusive and may not be the best approach in this case. *See, e.g., Ridley v. Mass. Bay Trans. Auth.*, 390 F.3d 65, 97 (1st Cir. 2004) (Tortuella, J., dissenting), citing Laurence H. Tribe, *American Constitutional Law* § 12-24, at 988 (2d ed. 1988) (deeming "public forum classifications . . . unnecessary and unhelpful" in challenges to content-based restrictions). Even in cases involving nonpublic fora, a policy that does not provide sufficient criteria to prevent viewpoint discrimination generally will not survive constitutional scrutiny:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups *either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by*

> *selective enforcement of an extremely broad prohibitory statute.*

Cox v. La., 379 U.S. 536, 557-558 (1965) (emphasis added). Minnesota has enacted a "broad prohibitory statute" that should be ruled unconstitutional regardless of forum classification.

Burson held that the Tennessee statute "bar[red] speech in quintessential public forums." *Burson*, 504 U.S. at 197. In a public forum, the government has an uphill battle to justify speech restrictions, but may enact reasonable time-place-manner regulations. Minnesota's restriction applies for a short time in a small space, so at first blush it may appear to fall within that framework. But because it is content-based, it cannot qualify even if the space is a nonpublic forum. "[T]his approach . . . would require some expansion of (or a unique exception to) the 'time, place, and manner' doctrine, which does not permit restrictions that are not content neutral (§ 2-7-111 prohibits only electioneering speech)." *Id.* at 216 (Scalia, J., concurring). In *Burson*, the majority agreed that the statute was "not a facially content-neutral time, place, or manner restriction." *Id.* at 197.

Discretion per se is not "constitutionally fatal." *Minn. Majority*, 789 F. Supp. 2d at 1126, citing *Ridley*, 390 F.3d at 93 ("mere fact that a regulation requires interpretation does not make it vague"). In a nonpublic forum, discretion "must be upheld so long as it is reasonable in light of the characteristic nature and function of that forum." *Id.* at 95 (internal quotation marks omitted); *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323-24 (Fed. Cir. 2002) (selectivity and discretionary access are "defining characteristics of

non-public fora"). But viewpoint discrimination is impermissible in any forum, and "[w]hen a statute sweeps more broadly than is warranted by the evil at which it aims, a concern arises that the legislature . . . has created an excessively capacious cloak of administrative or prosecutoria[l] discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991). Here, the statute "applies to all political material, regardless of viewpoint" (*Minn. Majority*, 708 F.3d at 1057), but underlying this facial neutrality is a weapon inviting officials to favor (or disfavor) particular viewpoints. In *Ridley*, officials rejected religious advertisements based on a policy that prohibited "demeaning or disparaging" content. *Ridley*, 390 F.3d at 74. Such a policy creates a wide loophole for officials to censure viewpoints they dislike. This Court recently struck down a similar weapon on First Amendment grounds—the "disparagement" provision of federal trademark law. *See Matal v. Tam*, 137 S. Ct. 1744 (2017).

The Federal Circuit observed that no case in this Court suggests the doctrine of unbridled discretion is "applicable outside the setting of a public forum," and there is thus "no accepted framework" to evaluate such a challenge in a nonpublic forum." *Griffin*, 288 F.3d at 1321-22. But "several cases from [other] circuits[] have struck down standardless licensing schemes in nonpublic fora." *Id.* at 1323. *See, e.g., Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991) (invalidating Florida scheme giving unfettered discretion over placement of newspaper racks in highway rest areas). Unfettered discretion poses constitutional risks in any forum.

The Minnesota statute is also "not a licensing system allowing the regulation of speech in a public forum." *Minn. Majority*, 789 F. Supp. at 1128. That is a common context where unbridled discretion is condemned—but certainly not the only context. "A principle underlying many of our prior decisions in various doctrinal settings is that government officials may not be accorded unfettered discretion in making decisions that impinge upon fundamental rights." *Schall v. Martin*, 467 U.S. 253, 306–307 (1984) (Marshall, J., dissenting). It is particularly relevant to content-based regulations. This Court recently noted the possibility of "a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services." *Reed v. Town of Gilbert*, 135 S. Ct. at 2229 (content-based sign code subject to strict scrutiny). The trademark provision this Court invalidated in *Matal v. Tam* gave the government carte blanche to render a "moral judgment[] based solely and indisputably on its moral judgment[] about the mark['s] expressive content." *In re Tam*, 808 F.3d 1321, 1338 (Fed. Cir. 2015). Here, Minnesota empowers election officials to deny the fundamental right to vote to prospective voters whose outward apparel displays a disfavored political view.

II. THE STATUTE IMPEDES THE RIGHTS OF VOTERS INSTEAD OF PROTECTING THEM.

This case is principally about the rights of *voters*—their right to vote and their right to political expression. The state interests at stake are designed to protect those rights. The wide discretion granted to Minnesota officials risks infringing them:

> Although the state may adopt "reasonable and uniform regulations" regarding the "time and mode of exercising" the right to vote, that "afford[s] no warrant for such an exercise of legislative power, as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself."

Yick Wo v. Hopkins, 118 U.S. 356, 371 (1886), quoting *Capen v. Foster*, 29 Mass. 485, 489 (1832).

A. The Rights Of *Voters* Are Paramount—The Right To Vote And The Right To Political Expression.

It is vital to distinguish voters, candidates, campaign workers, poll workers, and other election participants. Although the government has "a compelling interest in securing the right to vote freely and effectively" (*Burson*, 504 U.S. at 208), it is the *voter* who holds that right, as well as the right to choose when, where, and/or if to express political views. Perhaps voters would be wise to avoid outward signs of political affiliation at the polls, but that is an individual choice. No voter should be turned away or prosecuted for engaging in the passive expression Minnesota prohibits.

In Minnesota, election judges were instructed not to turn away voters who failed to cover their political paraphernalia, *but* "their names and addresses would be recorded and referred 'to appropriate authorities.'" *Minn. Majority*, 789 F. Supp. 2d at 1118. Voters face an untenable choice—either sacrifice the right to vote or the right to expression. Neither option is constitutionally acceptable. The right to vote is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. at 370. Freedom of expression is equally important, "especially expression of political views, [which] ranks near the top of the hierarchy of constitutional rights." *Cohen v. California*, 403 U.S. 15, 24 (1971).

The rights of *voters* are primarily at stake in Minnesota, not the rights of others involved in elections. Sometimes the rights of candidates are also impacted by this type of statute. This Court described *Burson* as "a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote – a right at the heart of our democracy." *Burson*, 504 U.S. at 198. But the action in *Burson* was not filed by a *voter* whose rights were infringed, but by a *candidate* for office. *Id.* at 194. It was a candidate's "right to engage in political discourse" that hung in the balance. The Tennessee Supreme Court observed that the statute regulated "a certain category of speakers, campaign workers." *Freeman v. Burson*, 802 S.W.2d 210, 213 (Tenn. 1990).

Candidate rights are important, but they do not coincide perfectly with the rights of voters. In *Burson*, there was an impact on last-minute campaigning, especially for "candidates with fewer resources,

candidates for lower visibility offices, and grassroots candidates." *Burson*, U.S. 504 at 224 (Stevens, J., dissenting). Areas near the polls may serve as "a forum of last resort" for these candidates. *See Hill v. Colorado*, 530 U.S. 703, 763 (2000) (Scalia, J., dissenting). At the same time, this Court observed there was ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud—evils that the state legitimately seeks to reduce. *Burson*, U.S. 504 at 207. In this case, the concern is not about candidate rights, but solely about what *voters* may wear to the polls.

Past elections reveal a multitude of voters having trouble gaining access to the polls because of what they were wearing. Kimberly J. Tucker, *Article: "You Can't Wear That To Vote": The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. Marshall L. Rev. 61, 82-83 (Fall 2006). The author described her own frustration at the Virginia polls in 2004, where she was asked to remove her John Kerry button and even threatened with arrest when she initiated a conversation about the First Amendment. *Id.* at 61. In Virginia, instructions varied from county to county, with some calling for removal of buttons (*id.* at 83 n. 197-198) and others considering it a "matter of free speech" (*id.* n. 199-200). Voters in South Carolina were told to remove their pro-Bush buttons in the polling area. *Id.* at 83 n. 194. Voters in both Florida[9] and New

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[9] http://www.wptv.com/news/region-c-palm-beach-county/palm-beach/palm-beach-family-says-they-faced-trouble-at-the-polls-for-wearing-trump-shirts (last visited 12/27/17). Florida law does not explicitly prohibit such apparel.

Mexico[10] faced extra hurdles at the polls when they showed up for the November 2016 election wearing Trump shirts. One woman trying to vote in Austin, TX in 2012 was compelled to cover her "Vote the Bible" shirt in order to vote.[11] Even shirts "reminiscent of a party" – "I Miss Bill" – were censured at Arkansas polls in 2016.[12] Adding to the confusion, non-political paraphernalia is sometimes mistaken for campaign material—Dallas Cowboys apparel in Texas when a stadium-finance issue was on the ballot and Denver Broncos items in Colorado when a stadium tax issue was on the ballot. *Id.* at 84. Even more bizarre, a voter in Houston, TX in 2008 almost lost her ability to vote because she wore a souvenir Alaska shirt that was misconstrued as support for Sarah Palin.[13]

These examples are all about *voters*—not aggressive campaign workers trying to secure votes or seeking signatures for a new ballot measure. It seems strange, and blatantly unconstitutional, that a policy meant to

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[10] http://nbc4i.com/2016/10/25/woman-not-allowed-to-vote-because-of-trump-shirt/ (last visited 12/27/17). New Mexico limits "electioneering" but does not expressly forbid wearing buttons, shirts, or similar items.

[11] http://nation.foxnews.com/war-religion/2012/11/01/woman-forced-cover-vote-bible-t-shirt-polls (last visited 12/27/17).

[12] http://5newsonline.com/2016/11/07/what-can-you-bring-to-a-polling-place-cellphones-political-t-shirts-children/ (last visited 12/27/17).

[13] http://www.chron.com/neighborhood/cyfair-news/article/Houstonian-wearing-Alaska-T-shirt-nearly-denied-a-1789897.php (last visited 12/27/17).

protect voters would be used to impede their access to the polls.

B. The State's Interests Are Subservient To The Rights Of Voters.

Several important state interests have been advanced to justify campaign-free zones in areas immediately surrounding the polls:

- "the right of . . . citizens to vote freely for the candidates" (*Burson*, 504 U.S. at 198)
- "the right to vote in an election conducted with integrity and reliability" (*id.* at 199)
- "protecting voters from confusion and undue influence" (*id.*)
- "preventing voter intimidation and election fraud" (*id.* at 206)
- "protect the integrity and reliability of the electoral process itself" (*Anderson v. Celebrezze*, 460 U.S. 780, 788, n. 9 (1983) (collecting cases))
- "maintain[ing] peace, order, and decorum" at the polls (*Mills v. Alabama*, 384 U.S. 214, 218 (1966))

All of these important state interests are designed to serve the voters and protect their right to vote freely and peacefully when they go to the polls. Voters also have the right to be fully informed as they cast their ballots. Although elections should be conducted in an orderly manner, this Court held that the state does not have a legitimate interest in insulating voters from Election Day campaigning. *Mills v. Alabama*, 384 U.S. at 219 (overturning conviction of newspaper editor who violated ban on election day editorial endorsements).

Minnesota's regulation of apparel and buttons does not fit the state's legitimate interests. As Judge Shepherd put it in his dissent:

> I fail to see how this broad restriction, which prohibits a voter from wearing any political emblem, insignia, or slogan that is unrelated to an issue or candidate on the ballot, would rationally and reasonably help maintain the "peace, order, and decorum" of the polling place, "protect[] voters from confusion or undue influence," or "preserv[e] the integrity of [Minnesota's] election process."

Minn. Majority, 708 F.3d at 1062 (Shepherd, J., dissenting). The connection between the regulation and the interests served is tenuous at best. It is hardly disruptive to the election process for a voter to quietly approach the ballot box wearing a shirt or button an official deems "political," according to Minnesota's nebulous standard. The state may not unnecessarily restrict constitutionally protected liberties even in pursuit of legitimate interests. *Anderson v. Celebrezze*, 460 U.S. at 806. The infringement is even more egregious where the state pursues illegitimate interests. *See Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004) (500-foot buffer zone around polling places was facially overbroad where the evidence suggested the government intended to cut off all electioneering speech rather than to prevent voter intimidation and corruption).

Under narrowly defined circumstances, depending on the place or the government's role, it may be

appropriate to limit political expression—even on clothing or accessories. It may depend on the place, and often other rights or legal doctrines are implicated:

- Courtroom - *Berner v. Delahanty*, 129 F.3d 20, 27 (1st Cir. 1997) (upholding trial judge's order for attorney to remove political button in the courtroom, which must be an absolutely fair and neutral environment)
- Political Rally - *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996) (upholding ban on wearing pins for opposing candidate [Clinton] at a political rally [Bush]) (implicates rights of association)
- VA Medical Centers - *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1314 (Fed. Cir. 2008) (rejecting unbridled discretion challenge to ban on "demonstrations" at VA Medical Centers in light of the need "to maintain a place of healing and rehabilitation for veterans")
- National Cemeteries - *Griffin*, 288 F.3d at 1324-1325 (veterans denied right to display Confederate flag in national cemetery because the government had reasonable discretion to ensure preservation of the commemorative functions of national cemeteries) (implicates government speech)

Sometimes the government does not act as a regulator, but assumes another role:

- Employer - *Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973) (upholding restriction on political expression of state employees during

working hours, including political buttons and bumper stickers)

- Editor - *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (candidate debate) (editorial discretion to restrict debates to candidates who received objective support from the public)
- Editor for Dept. of Defense Publications - *Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008) (rejecting vagueness challenge to political ad ban in DOD publication) (implicates government speech)

Polling places are a unique environment. While some restrictions on active campaigning may be needed to preserve an orderly process for voters, Minnesota's broad ban on political apparel tends to imperil the rights of voters rather than protecting those rights.

C. The Passive Speech Of Voters Is Not An Appropriately Targeted Evil.

Minnesota appears more concerned about voters who might be intimidated by the mere sight of a button or t-shirt on another voter, rather than voters who may be turned away from the polls because of the passive expression on their clothing or accessories:

> The Court concludes that prohibiting apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of "maintain[ing] peace, order, and decorum" at the polls.

Minn. Majority, 789 F. Supp. 2d at 1124 (following a discussion concluding that the Tea Party is "political" and the "Please I.D. Me" pins might confuse voters).

This conclusion is astounding in light of the passive nature of t-shirts, buttons, and similar items. Clothing is a means of communication protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15 (t-shirt containing offensive expletive). This Court has warned that a complete ban on a species of communication "can be narrowly tailored . . . only if *each activity within the proscription's scope* is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (upholding residential picketing ordinance) (emphasis added). Unlike the ordinance in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), which punished only disruptive conduct around schools in session, Minnesota punishes passive, peaceful expression without any evidence of disruption, coercion, undue influence, intimidation, fraud, or similar results. This is contrary to "our system, [where] undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 508 (1969). Just as the students in *Tinker* did not surrender their First Amendment rights at the school gate, "*voters do not surrender such rights at the polling room door.*" *"You Can't Wear That To Vote"*, 32 T. Marshall L. Rev. at 81 (emphasis added).

Many states have either enacted "button" laws or applied broad statutes to prohibit passive expression.[14] Some of them include language that would limit government discretion, such as restricting the prohibition to candidates or measures on the ballot.[15] Unfortunately, a few courts have upheld these restrictions on passive expression. The Fifth Circuit upheld Louisiana's "total ban on politicking," including "buttons and T-shirts," within a 600-foot radius of the polling place. *Schirmer v. Edwards*, 2 F.3d 117, 122-23 (5th Cir. 1993). In Michigan, a district court upheld a directive allowing election inspectors to ask Michigan voters to remove campaign buttons or cover up clothing bearing a campaign slogan or candidate's name, while admitting that "the wearing of political paraphernalia is speech protected by the First Amendment." *AFSCME, Council 25 v. Land*, 583 F. Supp. 2d 840, 847 (E.D. Mich. 2008). The D.C. Circuit upheld regulations

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[14] Cal. Elec. Code §§ 18370, 319.5; Del. Code Ann. tit.15, § 4942(d) (includes items referring to "issues"); 3 D.C.M.R. § 708.8 (Board regulation applied statute to apparel); Ind. Code Ann. § 3-14-3-16; Kan. Stat. Ann. § 25-2430(a); Me. Rev. Stat. tit. 21-A, § 682(3); Mich. Comp. Laws § 168.744(3); Minn. Stat. § 211B.11(1); Mont. Code Ann. § 13-35-211(3); Nev. Rev. Stat. § 293.740; N.H. Rev. Stat. Ann. § 659:43(I); N.J. Stat. Ann. § 19:34-19 (may not display, sell, give or provide badge, button, or other items to be worn); N.Y. Elec. Law § 8-104(1); R.I. Gen. Laws § 17-19-49; S.C. Code Ann. § 7-25-180; Tenn. Code Ann. § 2-7-111(b)(1); Tex. Elec. Code § 61.010(a); Vt. Stat. Ann. tit. 17, § 2508(a).

[15] Cal. Elec. Code § 319.5; Kan. Stat. Ann. § 25-2430(a); Me. Rev. Stat. tit. 21-A, § 682(3) (expressly allows small buttons with longest dimension not to exceed 3 inches); Mont. Code Ann. § 13-35-211(3); Nev. Rev. Stat. § 293.740; R.I. Gen. Laws § 17-19-49; Tex. Elec. Code § 61.010(a).

promulgated by Board of Elections that prohibited wearing political paraphernalia inside a polling place. *Marlin*, 236 F.3d. at 718.

It is particularly disturbing to observe the broad discretion granted to officials in the Michigan and D.C. cases, even in the absence of an express statutory prohibition on apparel. In states like Minnesota, where the statutory language has no limiting criteria, the law potentially allows election officials to deny the vote to persons whose button or t-shirt is unrelated to any current candidate or ballot issue. Any group with "identifiable political views" could include a religious group or other association with strong views about current issues. Some of the most controversial "political" topics of modern times have significant moral and religious implications for voters.

Passive political expression is not tantamount to the active campaigning at issue in *Burson* and other cases. Distribution of campaign materials *to* voters, or actively soliciting their signatures, is hardly comparable to passive expression *by* voters. "[S]uch silent speech does not present the harmful effects that active campaigning creates on a voter's right to be free from interference." "*You Can't Wear That To Vote*", 32 T. Marshall L. Rev. at 80. The Sixth and Eleventh Circuits have both upheld bans on active solicitation that could disrupt the voting process. *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004) (upholding Ohio's 100-foot campaign-free zone that prevented individuals from soliciting signatures on non-ballot related referendum); *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1215 (11th Cir. 2009)

(upholding Florida law that prohibited soliciting signatures, as voters exit the polls, for proposed city charter amendment to be placed on a future ballot).

One of the reasons this Court struck down the sweeping First Amendment activity ban in *Jews for Jesus* is that it would reach considerable non-disruptive speech, including "the wearing of campaign buttons or symbolic clothing"—a ban that could not be justified even in a nonpublic forum. *Jews for Jesus*, 482 U.S. at 575. And just as "[t]he line between airport-related speech and nonairport-related speech" was "at best, murky" in that case (*id.* at 576), the line between "political" and non-political is like a line in the sand on a windy day.

The Oregon Supreme Court wisely summarized the matter:

> The mere passive display of a political button or badge in a polling place does not constitute "improper conduct" of the sort contemplated in Article II, section 8. The silent expression of political opinion is not coercive. To the extent that such expression in the polling place might affect the votes of others, that influence cannot be deemed constitutionally "undue."

Picray v. Secretary of State, 140 Or. App. 592, 600 (1996).

III. THE EIGHTH CIRCUIT RULING EXACERBATES A DANGEROUS TREND TO ESTABLISH "FREE SPEECH ZONES" THAT IMPERIL FIRST AMENDMENT RIGHTS.

The "campaign free zone" in this case resembles the free speech zones that originated on college and university campuses following the student activism of the 1960s. Joseph D. Herrold, *Note: Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 Drake L. Rev. 949, 951 (Summer 2006). Some zones capture only protests. Others attempt to confine all First Amendment activity to a designated area, effectively silencing free speech. Free speech zones should have been laid to rest with this Court's decision in *Jews for Jesus* three decades ago. "On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual 'First Amendment Free Zone' at LAX." *Jews for Jesus*, 482 U.S. at 574. The same is true of free speech zones, yet the practice has spilled over into other contexts, including the world of politics.

These constitutionally questionable speech-free zones have generated a mountain of litigation over the years, with some measurable progress toward their elimination on school campuses.[16] Public universities, widely regarded as the "marketplace of ideas," are one

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[16] *See, e.g.*, https://www.thefire.org/free-speech-zones-then-and-now/ (last visited 12/27/17); *Stand Up for Free Speech Litigation Project*, http://www.standupforspeech.com/about/ (last visited 12/27/17)

of the last places where such government censorship should ever occur. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The zones enable school officials "to keep undesired or unpopular expressive activity out of mainstream campus life." *Capturing the Dialogue*, 54 Drake L. Rev. at 956. In recent years, even political conventions[17] and polling places have followed the trend, creating similar opportunities for officials to abuse discretion and suppress disfavored viewpoints. "Political-free zones . . . create[] an atmosphere that is completely sterilized of any political messaging." *Freedom of Speech & Election Day*, 65 Mercer L. Rev. at 343. In "politically restricted zones" there is more flexibility and "voters are allowed to wear campaign, party, or initiative paraphernalia." *Id.* Minnesota has created a highly restrictive zone using a policy that grants election officials free reign to chill voter expression based solely on the silent messages displayed on the buttons and clothing of voters.

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[17] *Capturing the Dialogue*, 54 Drake L. Rev. at 949 (government-imposed free speech zones widely reported in the media during 2004 Democratic and Republic National Conventions); https://www.aclu.org/news/aclu-sues-city-cleveland-over-rnc-rules-violate-free-speech (last visited 12/27/17).

CONCLUSION

For all of the foregoing reasons, the Minnesota statute should be declared unconstitutional and this Court should reverse the Eighth Circuit ruling.

Respectfully submitted,

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No. 16-1435

In the Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL.,
Petitioners,

v.

JOE MANSKY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose missions are to advance the interests of cities, counties, and other local governments. They file this brief to address the constitutional authority of states to maintain order at polling places, a matter of considerable importance to both governments at all levels and to the individuals who are served by those governments. *Amici* include:

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes more than 1,400 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and edu-

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[1] No counsel for a party authored the brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

cational organization of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners maintain that the Minnesota law challenged in this case has a "breathtaking reach" that criminalizes "all political speech that can be communicated through shirts, hats, buttons, and other apparel," even though that speech assertedly "imposes no demands or burdens on others." Pet. Br. 2, 3. But this contention is wrong in every respect. Far from marking out a "breathtaking" scope, Minnesota's statute addresses speech in only one very limited and specialized location: the polling place. The law is directed at a type of display that threatens to interfere with the right of voters to cast their ballots freely, without intimidation or disruption. And it states a reasonable rule that has been applied by numerous States—without challenge or, for all that appears, any significant limitation on political debate—for over a century.

In fact, Minnesota's Section 211B.11 takes reasonable steps to assure the security and order that is essential if voters are to be able to cast their ballots

efficiently and without interference. For much of this country's history, voting was a dangerous and disorderly process that discouraged large numbers of Americans from entering polling places. Commentators compared elections to sporting events, with heckling and harassing of the other side's voters a natural component of the electoral process and with clothing serving as an indicator of which side a voter favored. Consequently, voters were harassed (or pressured to vote) based on what they wore. In response to these problems, in 1912, Minnesota enacted the predecessor statute to Section 211B.11.

For all the progress the United States has made in the past century, polling-place problems are still widespread. Delays, fights, and other incidents remain common problems. These incidents not only intimidate or discourage the particular voters who are directly affected, but also more generally diminish trust in American election administration and depress voter turnout. Political shirts and buttons, which can impede the voting process and are often designed to provoke and offend, can be expected to exacerbate these problems.

For these reasons, Minnesota has designated polling places nonpublic fora, where voters may cast their ballots freely and without fear of harassment. Restrictions on speech in such a nonpublic forum need only be reasonable. In light of the contentious history of and continuing problems at polling places, Minnesota's decision to exclude political apparel from those locations, and to vest poll workers with discretion to enforce that ban, easily meets this bar. That so many Americans now cast their ballots in a peaceful and orderly process is a testament to how far elections have progressed. The Court should re-

ject petitioners' invitation to return polling places to the turmoil of the past.

ARGUMENT

I. STATE REGULATION OF CAMPAIGN RELATED EXPRESSION AT THE POLLING PLACE HAS BEEN KEY TO ESTABLISHING ORDERLY AND PEACEFUL ELECTIONS.

As the Court recognized when it addressed the closely related issue in *Burson* v. *Freeman*, 504 U.S. 191 (1992), the history of legislation like Minnesota's provides helpful context for the question presented here. In attempting to distinguish *Burson*, petitioners mention—but do not describe or discuss—the Nation's electoral history, asserting that the *Burson* Court's decision sustaining Tennessee's establishment of a "campaign-free zone" around polling places concerned only active campaigning or soliciting of votes. Pet. Br. 36-38. But the history of statutes like Tennessee's Section 2-7-111(b) (at issue in *Burson*), Tenn. Code Ann. § 2-7-111(b), and Minnesota's Section 211B.11 (at issue here), Minn. Stat. § 211B.11, shows that the considerations that underlay *Burson* also are present in this case.

Although active solicitation of votes was, indeed, a serious concern at the time these laws were enacted, the regulations were adopted as part of broader election reforms aimed at addressing general disorder and violence around polling places, which was often fueled by campaign paraphernalia. The significant state interest in establishing and maintaining the integrity of the electoral process was properly understood to justify restrictions on the display of such campaign materials, including campaign related badges, buttons, and insignia-bearing clothing.

The American public now associates Election Day with orderly and peaceful (if sometimes long and slow) lines of voters and secret ballots, but this composed electoral process was not the norm for much of American history. Prior to the twentieth century and the widespread adoption of state laws prohibiting electioneering at polling places, Election Day often had an unruly character. The focal point of disorder and raucousness was the polling place. As one scholar has noted, "election contests had marked similarities to sporting events," with voters wagering on the outcome, drinking alcohol, and harassing other voters. Robert J. Dinkin, *Election Day: A Documentary History* 2 (2002). "Banners, placards, fistfights, shouting matches, [and] marching bands" were commonplace. Andreas Teuber, *Elections of Yore*, N.Y. Times,Nov. 4, 1980, at A19, goo.gl/sk4RyQ. The social and party-like atmosphere, as well as the occasional promise of free alcohol, were incentives for citizens to come out and vote. Dinkin, *Election Day: A Documentary History* at 8.

This uncontrolled atmosphere at the polling place often degenerated, with poll workers unable to prevent campaign-related violence and voter intimidation. As the plurality recognized in *Burson*, "[a]pproaching the polling place * * * was akin to entering an open auction place." 504 U.S. at 202. In some elections, party members would actively battle for control of the polling place, marching around the polls and planting banners to declare their dominance. *Young Man Observes Riotous Election in the West—St. Louis, 1838*, in Dinkin, *Election Day: A Documentary History*, at 68-69. Physical violence between opposing parties and ethnic groups became so common in some areas that it was considered the norm, not the exception. Dinkin, *Election Day: A*

Documentary History, at 9. One effect of this disorder was to "keep away elderly and timid voters of the opposition." *Burson*, 504 U.S. at 202.

Of particular relevance here, insignia that were worn or displayed by voters contributed significantly to polling place disruptions. Voters were frequently targeted for intimidation based on their clothing and other signals of party allegiance. The gathered crowds "often insulted voters who appeared to be supporting the opposing party," and "individuals were stereotyped as friend or foe on the basis of clothing." Richard Franklin Bensel, *The American Ballot Box in the Mid-Nineteenth Century* 20-21 (2004). By the presidential election of 1896, campaign buttons had also become common identifiers. Ted Hake, *Encyclopedia of Political Buttons: United States 1896-1972*, at 13 (1974). At the polls, voters who explicitly identified with a campaign were approached by others who "construct[ed] them as allies or enemies." Bensel, *The American Ballot Box in the Mid-Nineteenth Century*, at 21.

To address this widespread voter intimidation and disorder, States enacted laws around the turn of the twentieth century prohibiting various forms of electioneering at the polls—including the distribution and display of political insignia. See, *e.g.*, 1912 Minn. Laws, 1st Spec. Sess., Ch. 3, § 13; Ariz. Rev. Stat., Tit. 20, § 77 (1901). Starting in 1893, the Minnesota legislature forbade anyone within 25 feet of the entrance to the polling room to ask, persuade, or endeavor to persuade any person to vote for any particular candidate or to suggest that the voter do so. 1893 Minn. Laws, Ch. 4, § 108. By 1912, a provision was added to prohibit the provision and wearing of political badges, buttons, or other insignia at or

about the polls on the day of an election. See 1912 Minn. Laws, 1st Spec. Sess., Ch. 3, § 13; see also Resp. Br. 4-5.

Concerns that campaign-related speech at the polling place could undermine the integrity of elections were not limited to Minnesota. During this same period, States across the country passed laws to prevent disruption of the electoral process. In 1891, Delaware went so far as to ban "any political discussion" within the polling place. 19 Del. Laws 150 (1891). Wisconsin codified a law in 1889 prohibiting solicitation of votes, electioneering, or the display of ballots at the polls. Wis. Stat. § 23*g* (1889). Similarly seeking to maintain peace and order at the polls, New York prohibited any "political banner, poster, or placard" in the polling place in 1896. 1896 N.Y. Laws 960. And in 1930, New Jersey prohibited badges, buttons, and other insignia at the polls or within 100 feet theoreof. 1930 N.J. Laws 884; see also 1935 Miss. Laws 37 (making it unlawful to post or distribute cards, posters, or other campaign literature within 150 feet of a polling place). Today, ten States have laws materially identical to Minnesota's bar on political apparel in the polling place, and all 50 States have statutes that prohibit some form of electioneering or political display in or around the polls. See Resp. Br. 6; National Ass'n of Secretaries of State, *State Laws Prohibiting Electioneering Activities Within a Certain Distance of the Polling Place* (Aug. 2016), perma.cc/G94A-7UB7. These laws vary from prohibiting loitering and congregating at the polling place to bans on political buttons and attire. *Ibid.*

These state laws securing the vicinity of the polling place effectively reduced the "open auction" na-

ture of elections. In doing so, States promoted peace and prevented intimidation the polls, protecting the integrity of the electoral process. See *State* v. *Black*, 24 A. 489, 490-91 (N.J. 1892). Building on the adoption of the Australian ballot, *Burson*, 504 U.S. at 203-05, these state laws also ensured that votes were not made public, whether by distinctively marked and colored ballots (see *Doe* v. *Reed*, 561 U.S. 186, 226 (2010) (Scalia, J., concurring in the judgment)), or by distinctive clothing and speech. Bensel, *The American Ballot Box in the Mid-Nineteenth Century*, at 20. And by restoring order, these laws—like the Minnesota statute at issue here—made it unnecessary that, in order to exercise the franchise, voters exhibit "firmness" in pressing forward through hostile crowds. George Washington McCrary, *A Treatise on the American Law of Elections* 354 (Henry L. McCune, 2d. ed.,1880). Our modern, more orderly elections reflect the success of these laws in curbing disruption and intimidation, not lack of need for them.

II. DISRUPTION AT POLLING PLACES REMAINS A SIGNIFICANT PROBLEM.

The success of state election reform laws means that Election Day no longer resembles a professional wrestling match, which greatly increases the likelihood that voters will be able to cast their ballots without fear or harassment. But modern elections are far from problem-free. Voters still sometimes face intimidation, physical violence, and long delays, all of which impede election administration and may frustrate exercise of the right to vote. And each of these dangers is exacerbated by the wearing of political apparel in the polling place—which means that

Minnesota's ban on such apparel is integral to the provision of safe, orderly, and inclusive elections.

A. Polling places sometimes experience serious disruptions.

There is no doubt that, for all the advances that have been made in the management of elections, the possibility of interference with the operation of the polls remains disturbingly real. In fact, polling places are still sometimes plagued by disruptions such as voter intimidation and fights between individuals. Poll workers face serious challenges in handling these disturbances, which inevitably impede the administration of orderly elections.

Voter intimidation at polling places is well documented. Shouting and other forms of disorder outside voting locations are frequent problems. See, *e.g.*, *What We Know So Far About Voting Problems*, PBS (Nov. 8, 2016), perma.cc/E3A5-M6RN. A small sample of examples from the 2016 election include:

- signs aimed at particular groups, see, *e.g.*, Andrew Kragie (@AndrewKragie), Twitter (Nov. 8, 2016), perma.cc/6EGM-5AUW (documenting a FAGGOTS VOTE DEMOCRAT sign outside a Texas polling place);
- individuals blocking entrances to polling places, see, *e.g.*, Ari Berman (@AriBerman), Twitter (Nov. 8, 2016), perma.cc/BTL3-Z4BG;
- wielding of firearms, see, *e.g.*, Ryan J. Reilly, *A Guy in a Trump Shirt Carried a Gun Outside of a Virginia Polling Place. Authorities Say That's Fine*, Huffington Post (Nov. 4, 2016), perma.cc/RF8V-M5L2; and

- general disorderly conduct, see, *e.g.*, *Live Updates: Voting Issues Reported at Polling Places on Election Day*, CBS News (Nov. 8, 2016), perma.cc/GE5V-LBTP.

Similarly, fights are commonplace at the polls. In 2016, for example, a fight broke out as a result of campaign signs allegedly being too close to a polling place. See CBS Los Angeles, *2 Separate Fights Erupt at Orange County Polling Places* (Nov. 8, 2016), perma.cc/6KF2-6QAM. Polling place fights can involve abusive language and weapons. See, *e.g.*, *Racial Slurs Fly in Polling Place Fight*, TMZ (Nov. 8, 2016), goo.gl/Q3cxMe (describing a fight in which a woman used racial slurs); Sam Smink (@samsmink-WPTV), Twitter (Nov. 8, 2016), perma.cc/7XG9-RBUJ (describing a fight at a polling place in which one man pulled out a gun); Jimmie Johnson, *Fight Breaks Out at Polling Place*, WPBF News (Nov. 8, 2016), perma.cc/7UAE-MELD (documenting a fight in which one voter sprayed another with pepper spray). And most problems of this sort are not communicated to the press, so these reports surely represent only a small fraction of the fights and incidents of voter intimidation that occurred on Election Day in 2016. See, *e.g.*, *Live Updates: Voting Issues Reported at Polling Places on Election Day*, CBS News (Nov. 8, 2016), perma.cc/2YLT-WC35 (noting calls to attorneys general about poll disruptions and other polling place issues).

Unsurprisingly, then, studies of polling places show that disruptive incidents are frequent. The most comprehensive attempt to document such incidents at polling places comes from a study of four recent Wisconsin elections. See Barry C. Burden et al., *What Happens at the Polling Place: Using Adminis-*

trative Data to Look Inside Elections, 77 Pub. Admin. Rev. 354 (2017). Although this study did not cover the entire State, and therefore substantially understated the size of the problem, the study reported an average of thirty "disruptions" like fighting and voter intimidation per election. E-mail from Barry Burden, Professor of Political Sci., Univ. of Wis., to Rachel Frank, Yale Law Sch. student (Dec. 27, 2017, 5:38 PM EST) (on file with author). Extrapolated to the national level, this data suggest that there are over 1,500 significant disruptions in every national election. More broadly, the Burden study also found over 15,000 "incidents"—anomalous acts at polling places that required the attention of a poll worker—per election in Wisconsin alone. Burden et al., *What Happens at the Polling Place*, at 357. Roughly extrapolated to the national level, this data indicates that poll workers must contend with more than 750,000 such incidents in each national election.

The effects of these disruptions are exacerbated by the limited ability of poll workers to maintain order at the polls. Jurisdictions report significant trouble finding poll workers (see U.S. Election Assistance Commission, *2014 EAC Election Administration and Voting Survey Comprehensive Report* 14 (June 30, 2015), perma.cc/ADW6-XGDS (reporting that only 8 percent of jurisdictions reported have a "somewhat easy" or "very easy" time recruiting poll workers)), and allocate few resources toward training those they can recruit. See Presidential Comm'n on Election Administration, *The American Voting Experience: Report and Recommendations* 48 (Jan. 2014), perma.cc/GL52-HXXL. These poll workers are often retirees—the average poll worker is 75 years old—and therefore may be limited in their ability to intercede in a violent dispute. See Deborah Barfield Ber-

ry, *Election Officials Try to Recruit Younger Poll Workers*, ABC News, perma.cc/X5JT-F7Y2.

The absence of poll workers who are able to maintain order when disruptions occur has real consequences for voters. Poll-worker shortages are correlated with long lines at the polls, especially in minority-dominated areas. See Christopher Famighetti et al., Brennan Ctr. for Justice, *Election Day Long Lines: Resource Allocation* 2 (Sept. 15, 2014), perma.cc/ZDJ2-QRE2. Election protection reports filed by the Lawyers' Committee for Civil Rights Under Law similarly found that polling place management problems are among the most significant impediments facing voters. See Lawyers' Comm. for Civil Rights Under Law, *Striving to Protect Our Vote in 2016*, at 4 (Dec. 1, 2016), perma.cc/VD4A-5FZF (listing "poor poll worker training" and "voter intimidation and deceptive practices" as "top barriers" to voting in 2016); Lawyers' Comm. for Civil Rights Under Law, *The 2014 Election Protection Report: Democracy Should Not Be This Hard* 27 (Feb. 2015), perma.cc/BEU3-6P7W_(relating that "polling place problems result[ed] in long lines and frustrated voters" in 2014); Lawyers' Comm. for Civil Rights Under Law, *The 2012 Election Protection Report: Our Broken Voting System and How To Repair It* 27 (2013), perma.cc/K6AU-YFMX_(noting that over half of election problems reported to the organization are caused at the polling place); Lawyers' Comm. for Civil Rights Under Law, *Election Protection 2010 Report* 5 (Dec. 31, 2010), perma.cc/YGP7-SFYT (listing "polling place problems" and "deceptive and intimidating practices" as major issues in 2010); Lawyers' Comm. for Civil Rights Under Law, *Election Protection 2008: Helping Voters Today, Modernizing the System for Tomorrow* 12-13 (Dec. 31, 2008), perma.cc/KUM2-

NSX4 (reporting that "deceptive practices" and "polling place problems" were among the most frequent voting issues in 2008). The U.S. Civil Rights Commission has documented the same problems. See U.S. Comm'n on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election* (June 2001), perma.cc/VF3W-TPYD.

The frequency of incidents such as voter intimidation and fights, and the difficulty that poll workers face in managing such disruptions, provides important context as the Court considers petitioners' challenge to a law designed to prevent just such problems.

B. Disruptions in polling places lead to serious delays and non-voting.

Viewed in isolation, polling place disruptions that may intimidate or discourage individual voters are problematic. But such events also cause systemic problems, as poll workers must cease their routine duties assisting voters to resolve disputes. The resulting delays can cause significant interference with the casting of votes.

Even minor initial delays at the polling place can cascade into skyrocketing waiting times. For example, election experts have modeled the effect of allowing polling place photography such as "ballot selfies," demonstrating that, in the aggregate, small impediments have significant effects. One study found that a ten-second increase in the average time needed to process voters can lead to radically different outcomes in terms of voter waiting time. See Defendant's Expert Report of Charles Stewart, III, Ph.D at 19, *Crookston* v. *Johnson*, No. 1:16–cv–1109, 2016 WL 9281943 (W.D. Mich. Oct. 24, 2016) [hereinafter

Stewart Report]. What may seem like even a small increase in average wait time can have radical effects on the voting process because "queueing systems like those in polling places are very fragile." *Id.* at 20.

And disruptions that cause significant delays are a real impediment to the voting process. Our electoral system is already burdened by pernicious delays. Some voters waited seven hours to vote in 2012 (see Justin Levitt, *"Fixing That": Lines at the Polling Place*, 28 J.L. & Pol. 465, 466 (2013)), 11 hours in 2008 (see Dan Hardy & Nancy Petersen, *Long Lines for Lincoln University Students*, McClatchy Trib. Bus. News (Nov. 5, 2008); *Movie Star Among Voters Running into Problems*, CNN (Nov. 4, 2008), perma.cc/R8YC-LW9Y)), and ten hours in 2004. Levitt, *"Fixing That,"* at 466.

Delays are pervasive. One estimate found that voters spent approximately 23 million hours waiting in line to vote in 2012. Charles Stewart III & Stephen Ansolabeher, *Waiting in Line to Vote* 4 (2013), perma.cc/TE4A-TJ6B. The authors estimate the economic cost from this wasted time at about $550 million. *Id.* at 5. In 2004, eight percent of voters waited at least an hour (see Pew Research Ctr. for People & Press, *November 2008 Re-Interview Survey: Final Topline* 43 (2008), perma.cc/T2MU-4A8L), and 13 percent of jurisdictions nationwide considered long lines to be a major problem at their polling places in November 2000. See U.S. Gov't Accountability Office, *Elections: Perspectives on Activities and Challenges Across the Nation* 194 (Oct. 2001).

These election wait times have a disproportionate impact on minority voters. See Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling*

Places: How They Can Be Stopped, 11 Temp. Pol. & Civ. Rts. L. Rev. 401, 430 (2002). They also burden those who must pay for childcare while they vote and those with physical disabilities that prevent them from remaining in long lines. Levitt, *"Fixing That,"* at 467.

As would be expected, these delays have critical consequences for voters. Delays lead voters to "renege," meaning that they "show[] up to vote but leav[e] the line before ever actually casting a ballot," or "balk," meaning that voters "having waited in long lines in a previous election * * * anticipate lines in a future election and simply choose not to participate at all." Defendant's Expert Report of E. Scott Adler, Ph.D, Professor of Political Science, Univ. of Colo. Boulder at 13, *Silberberg* v. *Kosinski*, No. 16-CV-8336, 2017 WL 5641574 (S.D.N.Y. July 27, 2017) [hereinafter Adler Report]. Ten to 15 percent of non-voters "failed to vote because of the lengthy wait times," and "this figure went up between the 2008 and 2012 elections." *Ibid.* Other estimates concluded that between 500,000 and 700,000 persons did not vote in these elections due to long lines. Stewart & Ansolabehere, *Waiting in Line to Vote*, at 3. Long wait times likely contribute to the United States' lagging performance in terms of voter turnout; the U.S. is 28th out of 35 OECD countries in voter turnout. See Adler Report at 12.

Delays also undermine confidence in the electoral system. Political scientists have demonstrated that delays at the polling place play an important role in determining voter perceptions of the quality of their polling-place experience. See Stewart Report at 11 ("One factor that has been shown to influence a voter's perception of the quality of the polling plae

experience is the amount of time spent waiting to vote."). Voters are more than twice as likely to believe that their vote was counted as intended if they think their polling place was run well. See *id.* at 10 (observing that 71 percent of voters reporting their polling place was run "very well" were "very confident their vote was counted as intended," compared to 33 percent reporting that their polling place was "not well" run).

C. Allowing political apparel in polling places will exacerbate these existing problems.

These realities have obvious implications for the issues in this case: requiring States to permit political apparel at polling places will increase the already common disruptions that poll workers face, cause delays, and ultimately discourage voting.

1. The "Please I.D. Me" buttons at issue in this case provide a clear example of this danger. If the buttons were allowed, voters entering the polling place might mistakenly believe that the people wearing the buttons were poll workers and that voters are required to have an ID to vote in Minnesota. One consequence would likely be that voters without an ID would leave and not cast a vote. See U.S. Gov't Accountability Office, *Elections: Issues Related to State Voter Identification Laws* 48 (Sept. 2014), perma.cc/9849-TMAS (finding that voter ID laws depress turnout by two to three percentage points). Poll workers who notice this problem would be diverted from their other duties to explain that an ID is not needed in Minnesota, wasting time that would otherwise be spent aiding voters. This danger is not fanciful: the *point* of the "Please I.D. Me" button was to generate confusion and intimidation. See Resp. Br. 8.

Alternatively, "Please I.D. Me" buttons or shirts bearing Tea Party-associated images could provoke those with ideological disagreements to confront the wearers. Opposing activists might respond by donning buttons or shirts of their own that say: "Voter I.D. Laws Are Racist." Each side might try to bring larger and larger groups to overwhelm the other. Voters would face an increasingly hostile atmosphere. Fights between the two sides might break out. Poll workers might have to expend precious time and energy ensuring that voters are not harassed. Given the history of polling place disruptions, these are not fantastic scenarios. They simply hark back to an earlier point in history when these sorts of disruptions were the norm.

Nor are these resulting delays likely to be minor. Professor Stewart's analysis in the "ballot selfie" scenario shows that truly brief delays, such as the ten seconds needed to take a photograph, can cascade into much longer delays for subsequent voters. Stewart Report at 19. If a poll worker needs to step in repeatedly, either to clarify voting laws or to intercede between two or more angry voters, such disruptions will not be over in ten seconds; the effects will likely be more drastic still.

2. Moreover, "Please I.D. Me" buttons and Tea Party shirts are just the tip of the iceberg. Political apparel available today is by no means limited to anodyne paraphernalia in the style of "Reagan/Bush '84" or "Stronger Together." Fifteen minutes spent looking at political T-shirts and buttons for sale online reveals the enormous range of harassing, intimidating, and fight-provoking materials available, for purchasers at every spot along the political spectrum. Here and in the Appendix, we provide exam-

ples of the potentially disruptive political apparel that is now readily available—and that, if displayed in the polling place, could well lead to interference with the voting process.

There are T-shirts and buttons that could intimidate disfavored groups. Immigrants are a frequent subject of apparel messaging, such as shirts saying, "GET THE FUCK BACK ACROSS THE BORDER" and "SPEAK FUCKING ENGLISH." Some shirts are more graphic, such as one featuring a picture of two tacos under a box with a stick and the caption "HOW TO CATCH AN ILLEGAL IMMIGRANT." Other minority groups are also frequent subjects of offensive political apparel: "I LEARNED EVERYTHING I NEED TO KNOW ABOUT ISLAM ON 9.11"; "PUT THE WHITE BACK IN THE WHITE HOUSE"; a shirt with a picture of a noose and the phrase "SWING STATE"; "AIDS KILLS FAGS DEAD."

There is apparel that could be seen to threaten violence: "AMMO IS EXPENSIVE: DO NOT EXPECT A WARNING SHOT"; "IF AT FIRST YOU DON'T SUCCEED, RELOAD AND TRY AGAIN"; "SOMETIMES I AIM TO PLEASE, OTHER TIMES I SHOOT TO KILL."

And there is apparel that simply seems designed to provoke supporters of particular candidates or political parties. In 2008, for example, a shirt available for purchase featured a photo of Hillary Clinton and a donkey with the caption "TITS AND ASS 2008." In 2012, a T-shirt declaring "I'D RATHER SHOWER AT PENN STATE THAN VOTE FOR OBAMA" was spotted at a college football game. Such shirts can be found on both sides of the aisle. See, *e.g.*, "HEIL TRUMPLER"; "I WAS GOING TO BE A REPUBLICAN FOR HALLOWEEN BUT MY HEAD WOULDN'T FIT UP MY ASS"; "VOTING FOR TRUMP IS LIKE WINNING THE SPECIAL OLYMPICS. EVEN THOUGH HE WON, YOU'RE STILL RETARDED."

Given our history of electoral disruption—and taking account of human nature and common experience—it is easy enough to anticipate the disruption that such apparel could cause if worn in the polling place. On Election Day, feelings run high. Voters on opposing sides are packed together, often forced to wait impatiently in long lines. State resources to maintain order are limited and stretched thin. In this context, it would be surprising if political apparel that was designed to provoke, intimidate, and confuse voters did not have the desired effect.

III. A POLLING PLACE IS A NONPUBLIC FORUM WHERE POLL WORKERS MAY EXERCISE DISCRETION TO EXCLUDE APPAREL BEARING POLITICAL MESSAGES.

Minnesota need not ignore these predictably disruptive consequences of political apparel in the polling place. The State's response to this threat has been targeted and narrow: it is directed only at manifestly political apparel designed to influence or affect an election or voting, not at all offensive clothing and insignia. As we have shown, the wearing of such apparel may introduce disorder into a process where disruption would interfere with others' right to vote, making it reasonable for Minnesota to restrict political apparel at polling places. And because the regulation is reasonable, it is constitutional. Section 211B.11 is a regulation of a nonpublic forum, and is thus subject to review only for reasonableness.

Petitioners entirely sidestep forum analysis for this reason. See Pet. Br. 30 (calling such analysis "irrelevant"). But application of forum doctrine to Section 211B.11 necessarily leads to the conclusion that polling places serve a government function that would be undermined by expressive activity, and

that the State should be afforded space to serve this purpose by limiting the display of political apparel so long as it does not do so in a way that discriminates between viewpoints. See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) ("The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.").

A. Forum analysis must be applied to Section 211B.11.

When "assessing restrictions that the government seeks to place on the use of its property[,]" a "forum-based" approach is necessary. *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). This analysis is a "means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *United States* v. *Kokinda*, 497 U.S. 720, 726 (1990) (plurality opinion) (quoting *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

The nature of the forum, and the level of scrutiny given to regulation of a government-controlled space, is determined by the forum's intended and historical use. If the property has "traditionally been available for public expression" or if the State has opened it up to "expressive activity by part or all of the public[,]" it is "subject to the highest scrutiny" and any regulation of speech in the forum must be "narrowly drawn to achieve a compelling state interest." *International Soc'y for Krishna Consciousness*, 505 U.S. at 678; see also *Perry*, 460 U.S. at 45 (defining a public forum as one that "by long tradition or by government fiat ha[s] been devoted to assembly and debate"). But

regulations of "all remaining public property" are subject only to a "much more limited review": "The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *International Soc'y for Krishna Consciousness*, 505 U.S. at 678-79.

Where the "principal function of the property would be disrupted by expressive activity," the Court has been especially "reluctant to hold that the government intended to designate a public forum." *Cornelius*, 473 U.S. at 804. Accordingly, the Court has deferred to the State on how expressive activity should be regulated when expression has the potential to interfere with government purposes. See, *e.g.*, *Kokinda*, 497 U.S. at 723 (upholding a regulation prohibiting the solicitation of "alms and contributions" at post offices); *Lehman* v. *Shaker Heights*, 418 U.S. 298, 299 (1974) (upholding a law banning political advertising on public buses).

B. A polling place is a nonpublic forum, where restrictions on expression need only be reasonable.

In this context, a polling place is a quintessential nonpublic forum, where viewpoint-neutral restrictions on expression are permissible so long as they are reasonable. Polling places serve a critical state interest, and they have not historically served as sites of debate or assembly.

A polling place is not a public forum by "government fiat," designated as a site for discourse or self-expression. *Perry*, 460 U.S. at 45. Instead, it is set up for a clear and specific governmental purpose. Polling places are organized for the management of elec-

tions, where people go to obtain their ballots, fill the ballots out in a private booth, and then return the ballots for counting. To serve that end, the State is concerned with managing the polling place in a way that avoids interference with the vote and promotes peace and efficiency. See *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2242 (2015) (describing a nonpublic forum as a place where governments acts as "a proprietor, managing its internal operations" (quoting *International Soc'y for Krishna Consciousness*, 505 U.S. at 679)). The State may regulate expression in this space in a way that limits disturbances, as "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800.

Further, a polling place is a nonpublic forum by "by long tradition." *Perry*, 460 U.S. at 45. Polling places have not historically "been devoted to assembly and debate." *Ibid.* To the contrary, there has been a "widespread and time-tested consensus demonstrat[ing] that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Burson*, 504 U.S. at 206 (plurality opinion).

In *Burson*, the plurality found that a law restricting campaigning on the public sidewalk near a polling place is subject to strict scrutiny—upholding the law under that standard—on the view that sidewalks and streets generally fall into the public forum category, without addressing the status of the polling place itself. 504 U.S. at 196 n.2. But emphasizing the

special role of the polling place, Justice Scalia's deciding concurrence observed that the "streets and sidewalks around polling places have traditionally not been devoted to assembly and debate" and "are not public forums *in all places*, and the long usage of our people demonstrates that the portions of streets and sidewalks adjacent to polling places are not public forums *at all times* either." *Id.* at 216 (Scalia, J., concurring) (citing *Greer* v. *Spock*, 424 U.S. 828 (1976) (holding that the streets and sidewalks on military bases do not qualify as public fora)).

Whatever the validity of that conclusion as to public streets and sidewalks, it surely is correct as to polling places themselves:

> The forum here, the interior of a polling place, is neither a traditional public forum nor a government-designated one. It is not available for general public discourse of any sort. The only expressive activity involved is each voter's communication of his own elective choice and this has long been carried out privately—by secret ballot in a restricted space.

Marlin v. *D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 718 (D.C. Cir. 2001) (citing *Burson*, 504 U.S. at 201-06). And as a polling place is a nonpublic forum set up to facilitate elections rather than promote expression, regulations of this space need only be "reasonable in light of the purpose which the forum at issue serves." *Perry*, 460 U.S. at 49.

C. It is reasonable for Section 211B.11 to make subject matter distinctions and grant discretion to poll workers.

Here, the interest in preventing voter intimidation and disruptions like fights—as well as the delays and the associated suppression of voting that these disruptions may engender—is more than logically served by Section 211B.11. If, as the *Burson* plurality decided, campaign materials may be limited in and around polling places under an exacting scrutiny analysis, surely a regulation doing the same for political materials in the polling place must be treated as reasonable. Although petitioners challenge Minnesota's law on the ground that it makes distinctions on the basis of content and affords government officials too much discretion in applying those distinctions, these features serve the law's purpose and are reasonable regulations of a nonpublic forum.

Petitioners make much of the law's explicit regulation of "political" speech. See Pet. Br. 20-21. But given that the defining feature of a polling place is to manage the input of political preferences through voting, it is logical that expression on these preferences be limited at the polling place to provide a neutral space for voters to effectuate their right without disruption or intimidation. When a space is under government control, as it is here, the government may put limits on even "protected speech" if that speech is contrary to the government's legitimate purpose. *Cornelius*, 473 U.S. at 799. Subject matter distinctions, like ones concerning political speech, are "[i]mplicit in the concept" of such a forum. *Perry*, 460 U.S. at 49. In these spaces, the constitutional requirements are simply that the regulation on speech

is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46.

The grant of discretion to poll workers in Section 211B.11 is also a logical feature of a law enacted to limit immediate disruptions to polling places, as the Minnesota legislature cannot anticipate and itemize all the types of disruptive political messages that could be displayed. Like any other reasonable regulation involving a nonpublic forum or the analogous doctrine of government speech, "substantial discretion" is tolerable if it serves a government purpose and does not result in viewpoint discrimination. *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 572-73 (1998); see also *Griffin* v. *Secretary of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002) ("[T]he fact that discretionary access is a defining characteristic of the nonpublic forum should suggest that more official discretion is permissible in a nonpublic forum than would be acceptable in a public forum.").

Nonetheless, petitioners argue that Section 211B.11 runs afoul of the First Amendment because of this discretionary grant. Pet. Br. 23-24. But in making this argument, they fail to invoke any decision involving nonpublic fora. Although unbridled discretion may create First Amendment difficulties where a government official is, for example, deciding who may receive a parade permits on a public road, discretion that is exercised in a viewpoint-neutral manner does not pose such problems when it is needed to carry out the government's purpose in a nonpublic forum. Cf. *Forsyth Cty.* v. *Nationalist Movement*, 505 U.S. 123 (1992) (striking down variable fees for use of a public forum); *City of Lakewood*

v. *Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988) (striking down a law licensing newsracks in a public forum). Indeed, "[a]ll of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside the setting of a public forum." *Griffin*, 288 F.3d at 1321.

Here, the ban on "political" insignia does not grant election workers the discretion to discriminate between viewpoints. It is, instead, a reasonable attempt to identify messages with political meanings that could affect the integrity of an election. Such an implementation mechanism is not only reasonable but necessary, given the unique logistical challenges of election administration.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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[2] Representation by a clinic affiliated with the Yale Law School does not reflect the institutional views of the Yale Law School or Yale University.

APPENDIX

Apparel Directed at Candidates and Political Parties

- "ANNOY A REPUBLICAN. USE FACTS AND LOGIC," CafePress, perma.cc/LGG7-NT4X.
- "BROS BEFORE HOES" (PICTURE OF PRESIDENT OBAMA AND SECRETARY CLINTON), *Political T-Shirts at T-Shirt Hell*, Tee Reviewer (Mar. 13, 2008), perma.cc/DXR7-DPGC.
- "DUMP TRUMP IMPEACH CHEETO FACE: MAKE AMERICA RIOT AGAIN" (IMAGE OF A HAND PUNCHING PRESIDENT TRUMP, WHO IS WEARING A SWASTIKA BUTTON), Etsy, perma.cc/L9LZ-VJSU.
- "ELECTION 2008: 99 PROBLEMS AND THE BITCH IS ONE" (PICTURE OF HILLARY CLINTON), *Political T-Shirts at T-Shirt Hell*, Tee Reviewer (Mar. 13, 2008), perma.cc/DXR7-DPGC.
- "FUCK TRUMP," eCrater, perma.cc/A249-8XQW.
- "GROPER IN CHIEF," Etsy, perma.cc/2U4A-JF9D.
- "HEIL TRUMPLER," *'Heil Trumpler': Protester Throws Tomatoes at Trump During Iowa Rally*, Ruptly, perma.cc/797Q-TMB
- "HILLARY FOR PRISON 2016," eBay, perma.cc/4N-PJ-VCYR.
- "HITLER GAVE GREAT SPEECHES TOO" (WITH CARTOON OF HITLER AND PRESIDENT OBAMA), Foul Mouth Shirts, perma.cc/LF7V-TGC3.
- "I'D RATHER SHOWER AT PENN STATE THAN VOTE FOR OBAMA," Justin Baragona, *LSU Football Fans Display Anti-Obama Signs on ESPN's College*

GameDay, Politicus Sports (Oct. 25, 2014), goo.gl/64QaKf.

- "I WAS GOING TO BE A REPUBLICAN FOR HALLOWEEN BUT MY HEAD WOULDN'T FIT UP MY ASS," CafePress, perma.cc/68T5-BBD7.
- "KFC HILLARY SPECIAL: 2 FAT THIGHS, 2 SMALL BREASTS . . . LEFT WING," Jenna Johnson (@wpjenna), Twitter (May 2, 2016, 6:40 PM), perma.cc/4ZKE-83C8.
- "LIFE'S A BITCH: DON'T VOTE FOR ONE" (PICTURE OF SECRETARY CLINTON), Teespring, perma.cc/5LV7-4FUB.
- "MAP OF DUMBFUCKISTAN" (MAP OF UNITED STATES WITH MAP LEGEND LABELING RED STATES AS "DUMBFUCKISTAN"), CafePress, perma.cc/PCM9-7T4R.
- "NAZI TRUMPS: FUCK OFF!," Alternative Tentacles, perma.cc/HLM4-TFR4.
- "OBAMA '12" (PICTURE OF A MONKEY), Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.
- "OBAMA IN '08" (PICTURE OF MONKEY), Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.
- "OBAMA IS MY SLAVE," Earnest Harris, *Obama Ugly Slave Tee: "But It's Not About Race,"* Huffington Post (Dec. 6, 2017), perma.cc/Z7HY-W8BN.
- "PUTIN'S BITCH," (WITH PHOTO OF PRESIDENT TRUMP), Redbubble, goo.gl/3munuy.

- "SUPER CALLOUS FRAGILE RACIST SEXIST NAZI POTUS," Redbubble, perma.cc/JF5F-X9FM.
- "TINKLE TINKLE LITTLE CZAR.. PUTIN PUT YOU WHERE YOU ARE..," *Tinkle Tinkle Trump*, Teespring, perma.cc/9TM9-3SY7.
- "TITS AND ASS '08" (PICTURE OF SECRETARY CLINTON AND A DONKEY), *Political T-Shirts at T-Shirt Hell*, Tee Reviewer (Mar. 13, 2008), perma.cc/DX-R7-DPGC.
- "TRUMP: MAKE AMERICA GROPE AGAIN," Zazzle, goo.gl/pnX4Zt.
- "VOTING FOR TRUMP IS LIKE WINNING THE SPECIAL OLYMPICS. EVEN THOUGH HE WON, YOU'RE STILL RETARDED," Foul Mouth Shirts, perma.cc/9BWG-8QEK.
- "WE NEED A LEADER NOT A CREEPY TWEETER," Etsy, perma.cc/REJ2-DNLD.
- "WE HATE TRUMP BECAUSE HE IS RACIST; YOU HATED OBAMA BECAUSE YOU ARE RACIST," Teespress, Pinterest, perma.cc/H4AN-4LS7.

Apparel Directed at Minority Groups

- "AIDS KILLS FAGS DEAD," *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/6YJG-TNNS.
- "ALIEN INVASION: THERE'S NO PLACE LEFT TO RUN..." (PICTURE OF SOMBREROS MEANT TO LOOK LIKE FLYING SAUCERS), Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.

- "BE HAPPY, NOT GAY," *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/MH7M-QB3R.
- "BLACK OLIVES MATTER," Alexandra Ilyashov, *The Man Behind This Cringe-Worthy Black Lives Matter "Joke" Refuses To Apologize*, Refinery29 (Aug. 16, 2016, 6:00 PM), perma.cc/7FFQ-BJAK.
- "GET THE FUCK BACK ACROSS THE BORDER," Foul Mouth Shirts, perma.cc/R7S6-C3UE.
- "GO HOME DEPORT ILLEGALS," Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.
- "HOW TO CATCH AN ILLEGAL IMMIGRANT" (FEATURING A PICTURE OF TWO TACOS UNDER A BOX WITH A STICK), *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/BN25-RMGU.
- "I LEARNED EVERYTHING I NEED TO KNOW ABOUT ISLAM ON 9.11," Politically Erect Shirts, goo.gl/b1Aysn.
- "PUT THE WHITE BACK IN THE WHITE HOUSE," Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.
- "SPEAK FUCKING ENGLISH," Foul Mouth Shirts, perma.cc/GY6S-6T5M.
- "TRAYVON" (PICTURE OF A MIDDLE FINGER), Stuart Berkowitz, *The 10 Most Racist Republican T-Shirts*, Crave: Mandatory (May 2, 2016), perma.cc/H2GL-YLEG.

Apparel Advocating Violence

- "AMMO IS EXPENSIVE: DO NOT EXPECT A WARNING SHOT," Road Kill T-Shirts, perma.cc/XMB3-U92Q.
- "ENJOY THE SILENCE" (FEATURING A PICTURE OF A WOMAN WITH TAPE OVER HER MOUTH), *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/2CK5-UF3R.
- "FUCK YOUR GOD," No Gods No Masters, perma.cc/N9T7-KAD3.
- "KEEP CALM AND RAPE ON," *The 50 Most Controversial T-Shirts of All Time*, Cut, perma.cc/R397-4VBA.
- "IF AT FIRST YOU DON'T SUCCEED, RELOAD AND TRY AGAIN," Bad Idea T-Shirts, perma.cc/47RJ-VG9K.
- "SOMETIMES I AIM TO PLEASE, OTHER TIMES I SHOOT TO KILL," Foul Mouth Shirts, perma.cc/-UL6U-AE83.
- "SWING STATE" (PICTURE OF A NOOSE), Photobucket, perma.cc/YWB6-YR2G.

No. 16-1435

In The Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE;
ANDREW E. CILEK; and SUSAN JEFFERS,

Petitioners,

v.

JOE MANSKY, in his official capacity as Elections Manager for Ramsey County; VIRGINIA GELMS, in her official capacity as Elections Manager for Hennepin County; MIKE FREEMAN, in his official capacity as Hennepin County Attorney; JOHN CHOI, in his official capacity as Ramsey County Attorney; and STEVE SIMON, in his official capacity as Secretary of State of Minnesota,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, BEACON CENTER OF TENNESSEE, AND MISSISSIPPI JUSTICE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Minnesota election law forbids voters from wearing political badges, political buttons, or other political insignia at the polling place. *See* Minn. Stat. § 211B.11. The ban broadly prohibits any material "designed to influence and impact voting," or "promoting a group with recognizable political views," even when the apparel makes no reference to any issue or candidate on the ballot.

The Eighth Circuit, aligned with the Fifth and D.C. Circuits, invoked *Burson v. Freeman*, 504 U.S. 191 (1992), to hold that a state can impose a "speech free zone" without infringing on the Free Speech Clause of the First Amendment. There is deep tension between those decisions and the reasoning in decisions of the Fourth and Seventh Circuits, which hold that the First Amendment does not allow a state to prohibit all political speech.

The question presented is: Is Minnesota Statute Section 211B.11, which broadly bans all political apparel at the polling place, facially overbroad under the First Amendment?

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1976, Southeastern Legal Foundation is a national nonprofit, public interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated, both in and out of the courtroom, for the protection of our First Amendment rights. This aspect of its advocacy is reflected in regular representation of those challenging overreaching governmental actions in violation of their freedom of speech. *See, e.g., Bennie v. Munn*, 137 S. Ct. 812 (2017); *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); *Minority TV Project, Inc. v. FCC*, 134 S. Ct. 2874 (2014); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

The Beacon Center is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals. The Beacon Center has a vested interest in seeing the issue presented in this brief addressed by the Court.

Mississippi Center for Public Policy (MCPP) is an independent, nonprofit, public policy organization

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[1] All parties have consented to the filing of this brief by blanket consent or individual letter. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

based in Jackson, Mississippi, that was founded in 1991 by a small group of concerned citizens who wanted to protect the families of Mississippi. Over time the organization has grown to become a leading voice in Mississippi policy formation by informing the public to help them understand and defend their liberty. Mississippi Justice Institute (MJI) is the legal arm of MCPP and aims to represent Mississippians whose state or federal constitutional rights have been threatened or violated. MJI also works to defend the principles of MCPP in the courts, with a particular aim toward protecting liberty. This work takes many forms, including direct litigation on behalf of individuals, intervention in cases of importance to public policy, participation in regulatory and rulemaking proceedings, and filing *amicus curiae* briefs to give voice to the perspective of Mississippi families and individuals in significant legal matters pending in the courts.

Amici have an abiding interest in the protection of the freedoms set forth in the First Amendment – namely the freedom of speech. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions. *Amici* are profoundly committed to the protection of American legal heritage, which includes protecting the freedom of speech, a vital component to its system of laws.

SUMMARY OF ARGUMENT

In Minnesota, it is a crime to communicate political speech by wearing a shirt, hat, button or other apparel within a polling place or within 100 feet of a polling place for the entirety of early voting and election day. *See* Minn. Stat. § 211B.11. Minnesota claims that this complete ban on political speech is necessary to "keep the peace" – a claim that no doubt has our Founding Fathers, the very men who risked and gave their lives to ensure that Americans could forever engage in free discussion of political affairs, rolling in their graves. Even more shocking than Minnesota's criminalization of basic public discourse, is that the Eighth Circuit Court of Appeals upheld the ban. In doing so, the lower court applied an improper level of judicial scrutiny, disregarding this Court's First Amendment jurisprudence regarding content-based and political speech restrictions which requires the most exacting level of scrutiny.

This Court applies strict scrutiny review to laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). As Petitioners point out, the Court has repeatedly declared that "[c]ontent-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). This is because content-based restrictions are "the essence of censorial

power," *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 699 (1990) (Kennedy, J., dissenting), and as such, are nearly universally presumed to be invalid.

Nowhere are the threats of censorship more dangerous than when a content-based restriction prohibits public discourse on political issues. The freedom to publicly speak on political issues, especially those arising during elections, is critical to a functioning democracy. "[P]ublic discussion is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)). As a result, when a law burdens political or public issue speech, this Court traditionally applies the most exacting scrutiny available and will uphold such restrictions only if they are narrowly tailored to serve a compelling governmental interest. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (per curiam); *see also Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (applying strict scrutiny to law restricting political speech aired in a broadcast communication); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465 (2007) (same); *McConnell v. FEC*, 540 U.S. 93, 205-07 (2003) (same) (overruled on other grounds).

Amici agree with Petitioners that the Minnesota statute violates the overbreadth doctrine because it threatens the free speech rights of others and is thus facially unconstitutional. *Amici* write separately to further the point that should this Court find it necessary to weigh and apply a more formulaic approach, it should apply strict scrutiny.

ARGUMENT

I. This Court's traditional First Amendment jurisprudence subjects Minnesota's content-based restrictions to strict scrutiny.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).[2] "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980); *accord Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). The government has no business choosing "which issues are worth

[2] *See also Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964); *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388-89 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

discussing or debating." *Id.* at 537-38 (internal quotations omitted). Allowing the government to choose permissible subjects for public debate and speech in general would restrict the very marketplace of ideas that our Founding Fathers fought to keep free and open. *Id.*

"Content-based restrictions are the essence of censorial power." *Austin*, 494 U.S. at 699 (Kennedy, J., dissenting). This Court has concluded time and time again that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (citing *Carey v. Brown*, 447 U.S. 455, 463 (1980); *Mosley*, 408 U.S. at 95-96). Traditional First Amendment principles mandate that "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consol. Edison*, 447 U.S. at 540 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley*, 424 U.S. at 25). "A less stringent analysis would permit a government to slight the First Amendment's role 'in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Id.* at 541 (quoting *Bellotti*, 435 U.S. at 783).

As Justice Kennedy explained in his separate opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, "strict scrutiny . . . does not disable government from addressing serious

problems, but does ensure that the solutions do not sacrifice speech to a greater extent than necessary." 518 U.S. 727, 784-85 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, dissenting in part). Recognizing and dispelling concerns that strict scrutiny acts as a straightjacket, the Court has held that the government may proscribe certain categories of private speech which are not protected by the First Amendment[3] and that the government may regulate certain categories of speech because such regulations are narrowly tailored to serve a compelling governmental interest.[4]

II. Prohibitions of political speech demand the most exacting scrutiny.

When interpreting the First Amendment, "[w]e should seek the original understanding." *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring). Since 1724, freedom of speech has famously been referred to as the "great Bulwark of liberty." 1 John Trenchard & William Gordon, *Cato's*

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[3] Content-based restrictions on child pornography, incitement, obscenity, and fighting words are presumably valid because these categories of speech are not protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

[4] *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (holding that the First Amendment does not forbid creation of an area outside polling places that is off-limits to campaigning or solicitation).

Letters: Essays on Liberty, Civil and Religious 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (Oxford University Press 1988). Upon ratification, the First Amendment "was understood as a response to the repression of speech and the press that had existed in England[.]" *Citizens United*, 558 U.S. at 353. Through the First Amendment, our Founding Fathers sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 11 (Oxford University Press 1988). "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form." *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring).

A major purpose of the First Amendment was to protect public discourse, broadly defined. As this Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown*, 456 U.S. at 52 (quoting *Mills*, 384 U.S. at 218). " 'The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.' " *Meyer v.*

Grant, 486 U.S. 414, 421 (1988) (quoting *Thornhill*, 310 U.S. at 101-02).

"The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* (quoting *Roth*, 354 U.S. at 484). "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). This free discussion necessarily "includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills*, 384 U.S. at 218-19. Of these, the Court has observed that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot*, 401 U.S. at 272.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15. In finding a state law regulating the content of permissible speech during a judicial campaign unconstitutional, this Court explained that "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party v. White*, 536 U.S. 765, 781 (2002) (quoting *Eu v. San Francisco Cty.*

Democratic Cent. Comm., 489 U.S. 214, 222-23 (1989) (internal quotations omitted)).

When a law burdens political or public issue speech, this Court applies the most exacting scrutiny and upholds such restrictions only if they are narrowly tailored to serve a compelling government interest. *Buckley*, 424 U.S. at 44-45; *see also Consol. Edison*, 447 U.S. at 540-41; *Bellotti*, 435 U.S. at 786. "The people determine through their votes the destiny of a nation. It is therefore important – vitally important – that all channels of communication be open to them during every election. . . ." *United States v. Int'l Union United Auto., Aircraft and Agric. Implement Workers of Am.*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting). Taking this a step further, in 2010, the Court reaffirmed the principle that "[p]olitical speech is indispensable to decisionmaking in a democracy[.]" *Citizens United*, 558 U.S. at 349 (internal quotations omitted).

Application of intermediate scrutiny or rational basis review – anything less than the most exacting scrutiny – "would permit a government to slight the First Amendment's role 'in affording the public access to discussion, debate, and dissemination of information and ideas.'" *Consol. Edison*, 447 U.S. at 541 (quoting *Bellotti*, 435 U.S. at 783). Thus, requiring the government to establish that its content-based restriction on political or public issue speech is narrowly tailored to serve a compelling interest, ensures that the American people "retain control over the quantity and range of

debate on public issues." *Buckley*, 424 U.S. at 57 (quoting *Roth*, 354 U.S. at 484).

CONCLUSION

For the foregoing reasons, and those stated by Petitioners, *amici* respectfully requests that this Court reverse the decision of the court below.

Respectfully submitted,

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In the Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, *et al.*,
Petitioners,

v.

JOE MANSKY, IN HIS OFFICIAL CAPACITY AS ELECTIONS MANAGER FOR RAMSEY COUNTY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATES OF TENNESSEE, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, RHODE ISLAND, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici curiae—the States of Tennessee, Indiana, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, Rhode Island, Texas, and Utah[1]—submit this brief in support of Respondents because the States have a significant interest in ensuring that the First Amendment overbreadth doctrine is applied in a manner that respects and furthers state sovereignty, including the authority of state courts to interpret state laws. *Amici* States also have a strong interest in preserving their ability to enact reasonable and viewpoint-neutral restrictions on speech inside nonpublic forums, including inside polling places to protect their citizens' right to vote.

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission.

SUMMARY OF THE ARGUMENT

This Court should decline to hold Minnesota's statute regulating speech inside a polling place facially overbroad under the First Amendment.

1. When a *state* statute is challenged under the First Amendment as facially overbroad, our constitutional system of dual sovereignty requires that the State be afforded an opportunity to exercise its sovereign authority to definitively interpret its own law. Petitioners' overbreadth challenge rests on hypotheticals and conjecture about speech Minn. Stat. § 211B.11(1) might reach if it is interpreted expansively. But the mere plausibility that a statute might have some unconstitutional applications if interpreted broadly is insufficient to establish overbreadth; instead, the unconstitutional applications of a statute must be substantial in number, realistic, and grounded in actual fact. Minnesota officials have explained the meaning of Section 211B.11(1), and this Court should defer to that interpretation. If it declines to do so, the Court should at least certify the construction of the statute to the Minnesota Supreme Court before taking the extraordinary step of declaring Section 211B.11(1) facially overbroad. Nor should petitioners be permitted to base their overbreadth challenge on the very applications of the statute that were at issue in this case. The Eighth Circuit held Section 211B.11(1) constitutional as applied to petitioners, and petitioners strategically did not ask this Court to review that as-applied holding. If Section 211B.11(1) is in fact unconstitutional as applied to petitioners, then the strong medicine of the overbreadth doctrine is not warranted.

2. This Court should reject petitioners' invitation to abandon traditional forum analysis. Contrary to petitioners' assertions, this Court has consistently applied forum analysis in reviewing First Amendment challenges to regulations of speech on government property, including regulations that implicate political speech. Forum analysis is necessary because even protected speech is not equally permissible in all places. The First Amendment does not mandate that all government property be made available for unfettered First Amendment expression. Rather, the government, like a private owner of property, has the power to preserve the use of its property for its intended purpose, including by enacting reasonable and viewpoint-neutral limits on expression. Forum analysis ensures that the important functions served by properties under the control of state and local governments—polling places, prisons, police and fire stations, and public hospitals, just to name a few—will not be needlessly disrupted.

3. This Court should likewise reject petitioners' attempt to limit *Burson v. Freeman*, 504 U.S. 191 (1992), to laws prohibiting active electioneering. Like many other state laws, the Tennessee statute that was challenged in *Burson* prohibited—and still prohibits—not only active campaigning, but also the passive display of campaign materials, including shirts, buttons, and hats. The *Burson* Court was well aware of the statute's reach, and the reasoning it adopted in upholding the statute did not distinguish in any way between active and passive speech. Nor would such a distinction make sense; passive speech can be just as powerful as active speech. *Burson*'s reasoning instead reflected a reconciliation of two rights: the right to free

expression and the right to vote. That reasoning applies with equal force here and dictates that Minnesota's statute is a reasonable means of protecting the right to vote.

ARGUMENT

I. When Applied to a State Statute, the Overbreadth Doctrine Must Incorporate Deference to the State's Sovereignty.

As it comes before the Court, this case involves only a facial challenge to a state statute based on its alleged overbreadth. Overbreadth is manifestly "strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (internal quotation marks omitted). "[T]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Stevens*, 559 U.S. 460, 474 (2010) (quoting *Williams*, 553 U.S. at 293). But that step is fundamentally different when a *state* statute has been challenged. In our constitutional system of dual sovereignty, States retain the sovereign authority to interpret their laws definitively—authority this Court lacks. *See Webb v. Webb*, 451 U.S. 493, 500 (1981). Petitioners ignore this fundamental fact, but it has significant ramifications for the application of the overbreadth doctrine in this case and the propriety of this Court's review.

A. This Court's construction of a state statute as part of the overbreadth inquiry must account for the State's sovereign interpretation.

To demonstrate the overbreadth of Minn. Stat. § 211B.11(1), petitioners must show that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimately sweep." *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). In an attempt to meet that burden, petitioners have relied primarily on three types of evidence: (1) the "fanciful hypotheticals" that commonly infect overbreadth challenges, *Williams*, 553 U.S. at 301; (2) phrases—many of which are taken out of context—from the opinions below describing the potential applications of the statute or the plaintiffs' assertions about it; and (3) statements made in the context of this litigation in briefs and at oral argument, *cf. Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 398 (1988) (Stevens, J., concurring in part and dissenting in part) ("A matter as important as the constitutionality of a state statute should not be decided on the basis of an advocate's concession during oral argument[.]"). *See* Pet. Br. 23-29. All of this evidence culminates in petitioners' conclusion that "[t]he amount of protected speech that Section 211B.11(1) can *plausibly* ban . . . is truly staggering." Pet. Br. 28 (emphasis added).

Petitioners' fundamental error lies in the word "plausibly." Plausibility is insufficient. Petitioners bear the burden of demonstrating substantial overbreadth "from the text of [the law] *and from actual fact*." *Stevens*, 559 U.S. at 484 (Alito, J., dissenting)

(alterations and emphasis in original) (quoting *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)). And, "[s]imilarly, 'there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before Court.'" *Id.* (emphasis in original) (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). Petitioners seek to lighten their burden from "realistic" to "plausible" and, in so doing, subvert the overbreadth doctrine. Instead of proving "from actual fact" that a substantial number of "realistic" applications of Section 211B.11(1) would be unconstitutional, as judged in relation to its legitimate sweep, petitioners find it sufficient to demonstrate that a collection of cherry-picked phrases and responses to litigation hypotheticals make it "plausible" that the statute could be interpreted broadly.

Mere plausibility is particularly inadequate when this Court is asked to declare a state statute facially unconstitutional. Requiring petitioners' hypotheticals to be "realistic" and grounded in "actual fact" is vital to protecting the State's sovereign interests in the overbreadth inquiry. Relegated almost entirely to various string citations in petitioners' brief is the official state policy issued to provide guidance on the proper application of Section 211B.11(1). Pet. Br. 23-26. Petitioners barely address its text, let alone undertake an analysis of the "actual fact" of its application in the State of Minnesota. In a nod to their burden, petitioners do valiantly assert that "[n]one of [their evidence] is hyperbole," because "[r]eports abound of polling officials applying political apparel bans to turn away or penalize voters for wearing 'political' t-shirts at polling areas." Pet. Br. 27. But

none of those abundant "reports" involve Minnesota, let alone the Minnesota statute at issue here. And petitioners never demonstrate that similar applications would be "realistic" in Minnesota.

Respondents—who include the Secretary of State of Minnesota, the individual authorized by Minnesota law to provide guidance about Section 211B.11(1)—provide a specific, detailed interpretation of Section 211B.11(1) that is grounded in "actual fact" and "realistic." Resp. Br. 17-24. Before employing the "strong medicine" of the overbreadth doctrine to invalidate this state law in its entirety, *Williams*, 553 U.S. at 293 (internal quotation marks omitted), this Court must give due deference to that official interpretation. *See Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973) ("Surely a court cannot be expected to ignore [State officials'] authoritative pronouncements in determining the breadth of a statute."). Because no Minnesota court, let alone the Minnesota Supreme Court, has opined on the scope of the challenged law, "the prevailing construction is the one of the Executive Branch" of Minnesota's government, and "disregard[ing] the executive's views would raise profound questions in a federal system, one in which states, rather than the national government establish the meaning of state law." *Huggins v. Isenbarger*, 798 F.2d 203, 209 (7th Cir. 1986) (Easterbrook, J., concurring). The Minnesota Secretary of State issued an authoritative interpretation of Section 211B.11(1). *See* Minn. Stat. § 204B.27(2); Resp. Br. 22-23 & n.14. And based on this construction, which was consistent with prior interpretations of the statute, Minnesota officials implemented the law. Resp. Br. 22-24. Accordingly, this Court "should hesitate" before "conclud[ing] that

'[Minnesota's] Executive Branch does not understand state law.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 n.30 (1997) (quoting *Huggins*, 798 F.2d at 2010 (Easterbrook, J., concurring)).

The first step of the overbreadth inquiry—statutory construction—is, in large part, the determinative step in the inquiry. Even when a federal statute is at issue, this Court mandates that the construction include only realistic applications grounded in actual facts. When a *state* statute is at issue, those requirements assume paramount importance because they serve to protect the State's sovereign authority to construe and implement its own statutes. Out of respect for that sovereignty, this Court should hesitate before invalidating a state statute as facially unconstitutional based on petitioners' conjecture and carefully curated phrases.

B. This Court should ensure state courts have an opportunity to construe state statutes before invalidating them as overbroad.

Petitioners ask this Court to do something extraordinary: declare a state statute facially unconstitutional under the overbreadth doctrine without allowing the state court an opportunity to construe the statute and without definitive state court rulings on the scope of the statute. This Court should not take that radical step. *See Harrison v. NAACP*, 360 U.S. 167, 176 (1959) ("[T]he federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."). In *Stevens*, because the challenged provision

was "a federal statute, there [wa]s no need to defer to a state court's authority to interpret its own law." 559 U.S. at 474. Not so here. Section 211B.11(1) is a state statute, and thus there *is* "a need to defer to [the] state court's authority to interpret its own law." *Id.* As respondents point out, that option is readily available to the Court in the form of a certified question to the Minnesota Supreme Court. Resp. Br. 56-58.

From the inception of the overbreadth doctrine, this Court has ensured that it defers to a State's sovereign authority to interpret its law before declaring the law invalid. In *Thornhill v. Alabama*, widely regarded as the first overbreadth case, this Court granted certiorari to review an Alabama state court decision affirming a conviction under a loitering statute. 310 U.S. 88, 91 (1940); *see* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 863 & n.58 (1991). The Court held the law facially unconstitutional, but emphasized that it was relying on the State's interpretation of the statute, not the Court's own. The opinion first noted that the state "courts below expressed no intention of narrowing the construction put upon the statute by prior State decisions," *Thornhill*, 310 U.S. at 96, and then concluded that the statute as "authoritatively construed and applied" by Alabama courts was overbroad and left "room for no exceptions," *id.* at 99.

Many overbreadth challenges to state statutes have, like *Thornhill*, reached this Court on a writ of certiorari to a state court. *See, e.g.*, *Hicks*, 539 U.S. at 117-18; *Hill v. Colorado*, 530 U.S. 703, 711-14 (2000); *Osborne v. Ohio*, 495 U.S. 103, 107-08 (1990); *Massachusetts v. Oakes*, 491 U.S. 576, 580-81 (1989);

New York v. Ferber, 458 U.S. 747, 752 (1982). In those cases, the state court had already had an opportunity to construe the statute as part of its overbreadth analysis, and this Court considered itself bound by that construction. *See, e.g.*, *Hicks*, 539 U.S. at 121 (Virginia Supreme Court's determination that potentially unconstitutional part of the statute was not severable was a "matter of a state law"); *Oakes*, 491 U.S. at 594 (a "restrictive reading of the statute or its partial invalidation" was "beyond [the Court's] power" in light of the state court's construction); *Ferber*, 458 U.S. at 767 ("[T]he construction that a state court gives a state statute is not a matter subject to our review.").

Osborne is a paradigmatic example. There, reviewing a child pornography conviction, the Ohio Supreme Court adopted a narrowing construction of the challenged statute. 495 U.S. at 112-14. Accordingly, this Court found it unnecessary to resolve the challenger's arguments about the scope of the statute "as written" because "the statute, as construed by the Ohio Supreme Court on Osborne's direct appeal, plainly survive[d] overbreadth scrutiny." *Id.* at 112-13. This Court also rejected Osborne's argument that the Ohio Supreme Court could not narrow the statute in the context of his appeal, emphasizing that this Court "ha[d] long respected the State Supreme Courts' ability to narrow state statutes" and that an inability to "narrow the statute, affirm on the basis of the narrowing construction, and leave the statute in full force" would "require a radical reworking of our law." *Id.* 119-20.

By contrast, when this Court reviews an overbreadth challenge to a state statute on writ of

certiorari to a *federal* court, the "First Amendment overbreadth doctrine creates a serious risk of judicial error" because neither this Court nor the lower federal court can "hold a state statute unconstitutional without anticipating the meaning that a state court would assign." Fallon, *supra*, at 900. Certification eliminates that "serious risk of judicial error." *See Arizonans for Official English*, 520 U.S. at 76 (certification and abstention are "[d]esigned to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues"). As Justice O'Connor explained in the context of an overbreadth challenge to a Washington law, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring). If this Court has concerns about potential applications of Section 211B.11(1), the Minnesota Supreme Court "stands willing" to address questions about it. Minn. Stat. § 480.065(3); *cf. Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (certification was not appropriate "because California ha[d] no certification procedure"). Instead of "gratuitous[ly]" employing the "strong medicine" of overbreadth, this Court should certify a question to the Minnesota Supreme Court and avoid the "serious risk" of "federal-court error" that petitioners invite this Court to commit.

The reasons this Court has in the past rejected pleas for certification—or its analogue, abstention—do not apply here. In *Dombrowski v. Pfister*, this Court

declined to abstain because "the interpretation ultimately put on the [challenged statutes] by the state courts [would have been] irrelevant," and because "no readily apparent construction suggest[ed] itself as a vehicle" by which to cure the constitutional defect. 380 U.S. 479, 490-91 (1965). In *City of Houston v. Hill*, this Court declined to abstain or certify because the ordinance at issue was "unambiguous" and "not susceptible to a limiting construction," and because state trial courts had "regularly applied" the ordinance and had "had numerous opportunities to narrow the scope of the ordinance" but had not done so. 482 U.S. 451, 468, 470 (1987). And in *Jews for Jesus*, in addition to California's failure to provide for certification, this Court pointed to the fact that the "words of the resolution simply leave no room for a narrowing construction." 482 U.S. at 575.

These rationales do not apply here; thus "[a] more cautious approach [is] in order." *Arizonans for Official English*, 520 U.S. at 77. Even if this Court rejects respondents' interpretation of Section 211B.11(1), petitioners do not claim that the term "political" is "unambiguous"; indeed, they rely on its ambiguity as a key component of their argument. *See, e.g.*, Pet. Br. 14, 25, 35-36 (characterizing "political" as an "amorphous," "malleable" and "vague" term that has "no logical stopping point"). And because the overbreadth inquiry depends on the scope of Section 211B.11(1), the Minnesota Supreme Court's construction of it would not only be "relevant" but likely dispositive. Moreover, if this Court declines to accept respondents' interpretation of Section 211B.11(1), the statute is undoubtedly still "susceptible to a limiting construction" and includes ample "room for a

narrowing construction." Finally, no Minnesota courts have "regularly applied" Section 211B.11(1) or had an opportunity to adopt a narrowing construction. No Minnesota court has even had an opportunity to interpret it. Resp. Br. 4 n.2.

When a *state* statute is the subject of a facial overbreadth challenge, it is the State's prerogative to determine whether a narrowing construction, when possible, should be adopted. *See Arizonans for Official English*, 520 U.S. at 78-79 (the "cardinal principle" that a court should consider narrowing constructions "bear[s] heighted attention when a federal court is asked to invalidate a State's law"). This Court must "proceed with caution and restraint" when a state statute is at issue because "invalidation may result in unnecessary interference with a state regulatory program." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). Accordingly, "the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts." *Id.* That is not the case here. As was the case in *Babbit v. United Farm Workers National Union*, if this Court rejects respondents' interpretation, the "uncertain issue of state law" that would remain in this case "[turns] upon a choice between one or several alternative meanings" of Section 211B.11(1). 442 U.S. 289, 308 (1979) (alteration in original) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964)). "Accordingly, . . . the [Minnesota] courts should be 'afforded a reasonable opportunity to pass upon' the section under review." *Id.* (quoting *Harrison*, 360 U.S. at 176).

If this Court declines to accept the construction provided by state and local officials as respondents or has concerns that "realistic" applications of the statute based in "actual fact" intrude substantially on protected speech, *see supra* Part I.A., it should certify a question to the Minnesota Supreme Court about the statute's application. Certification to that court for an authoritative interpretation of the statute is a more appropriate course than wholesale invalidation. To do otherwise would be to ignore—indeed, undermine—principles of state sovereignty. *See Arizonans for Official English*, 520 U.S. at 79 ("[A] federal tribunal risks friction-generating error when it endeavors to construe a . . . state Act not yet reviewed by the State's highest court.").

C. The procedural posture of this case should preclude the Court from declaring the Minnesota statute overbroad.

The "strong medicine" of overbreadth is supposed to be the "last resort" for this Court, *Broadrick*, 413 U.S. at 613, an inquiry that permits this Court to consider applications of the law to third parties *only* when the statute may be constitutionally applied to the challengers in the case, *Brockett*, 472 U.S. at 502-04. If the statute's application to challengers is *not* constitutional, the case is "governed by the normal rule that partial, rather than facial, invalidation is the required course." *Brockett*, 472 U.S. at 504. Petitioners, through strategic maneuvering, have attempted to thwart that "required course" and, contrary to this Court's instruction, seek to "render inapplicable the rule that a federal court should not

extend its invalidation of a statute further than necessary to dispose of the case before it." *Id.* at 503.

This Court should not reward such gamesmanship with the overbreadth doctrine, particularly in a challenge to a state statute. Although petitioners have described hypothetical applications of Section 211B.11(1) that are outside of the facts in the complaint, their overbreadth argument relies principally on their position—rejected by the Eighth Circuit—that Section 211B.11(1) is unconstitutional as applied to passive political expression such as a "Tea Party" shirt—the precise facts of the sole claim remaining in this case. *See* Pet. Br. 24-25; Pet. App. A-3-A-6. If this Court determines that those applications are in fact unconstitutional, the "required course" is to invalidate the statute only *partially* as applied to the facts alleged in the complaint. *Brockett*, 472 U.S. at 504; *see also Ferber*, 458 U.S. at 769 n.24. That is because overbreadth analysis is not appropriate when the statute is susceptible to "partial invalidation." *Broadrick*, 413 U.S. at 613. But petitioners explicitly declined to seek certiorari from the Eighth Circuit's as-applied holding, Pet. i; instead they endeavor to "compel[]" this Court "to entertain an overbreadth attack when not required to do so by the Constitution," *Ferber*, 458 U.S. at 767.

Because petitioners have not challenged the Eighth Circuit's holding that Section 211B.11(1) is constitutional as applied to them, this case does not provide an appropriate vehicle for this Court to resolve the overbreadth question presented. *See Brockett*, 472 U.S. at 504. Considering the question of facial overbreadth is inappropriate if the Court is unable to

consider lesser extremes, such as partial invalidation based on the facts of a particular case. That is particularly true when a *state* statute has been challenged exclusively in federal courts, and the state courts have had no opportunity to construe the statute. *See Arizonans for Official English*, 520 U.S. at 79. Whatever the validity of the Eighth Circuit's as-applied holding, petitioners did not seek this Court's review of it. Neither is that question necessarily included in the question presented. *See* Resp. Br. 37 n.20. Accordingly, petitioners should not be permitted to reframe their as-applied challenge as one of overbreadth.

Overbreadth "do[es] not apply . . . where the parties fail to describe the instances of arguable overbreadth of the contested law." *Wash. State Grange*, 552 U.S. at 449 n.6. The primary examples of arguable overbreadth provided in petitioners' complaint are the same examples that form the basis for the as-applied challenge. *Compare* JA 82-84, *with* JA 87-89. And the Eighth Circuit ultimately found Section 211B.11(1) constitutional as applied to those facts. Pet. App. A-3-A-6. Accordingly, the Eighth Circuit was correct that petitioners' overbreadth challenge must fail because "the complaint does not allege that there were a 'substantial number' of . . . unreasonable applications in relation to the statute's reasonable applications." Pet. App. D-10.

By not seeking certiorari on that as-applied holding, petitioners seek to position themselves as plaintiffs to whom the statute may be applied constitutionally—thus allowing them to bring an overbreadth claim. At the same time, they continue to maintain that Section

211B.11(1) is unconstitutional as applied to them. *See* Pet. Br. 39-40 & n.11. They cannot have it both ways. Having failed to allow this Court to consider whether "partial invalidation" of Section 211B.11(1) is possible based on the "flesh and blood legal problem" presented by the facts of this case, *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (quoting *Ferber*, 458 U.S. at 768), petitioners cannot claim overbreadth based on those same or substantially similar applications. Nor can they demonstrate a "substantial number" of unconstitutional applications of Section 211B.11(1), judged in relation to its "legitimate sweep," *Stevens*, 559 U.S. at 473 (internal quotation marks omitted), by pointing to applications of the statute judged legitimate by the Eighth Circuit when they have not sought review of that judgment.

Petitioners should not be permitted to circumvent the normal progression from as-applied challenge to overbreadth analysis by strategic gamesmanship, particularly when the facial validity of a state statute is at issue. Thus, even if this Court determines that "realistic" applications of Section 211B.11(1) present constitutional concerns, *see supra* Part I.A, and declines to certify the construction of Section 211B.11(1) to the Minnesota Supreme Court, *see supra* Part I.B, the appropriate resolution of this case would be to dismiss it as improvidently granted because petitioners have failed to provide this Court the opportunity to consider a necessary prerequisite to an overbreadth challenge: the application of Section 211B.11(1) to the "flesh and blood" of the facts of this case. *Cf.* Stephen M. Shapiro et al., *Supreme Court Practice* 361 (10th ed. 2013) (dismissal of a question as improvidently granted may occur where the Court

"conclude[s] that it cannot reach the question accepted for review without reaching a threshold question not presented in the petition"). At the very least, this Court should follow the "required course" in an overbreadth challenge and consider the as-applied challenge first, despite petitioners' failure to include it in the question presented. *See Broadrick*, 413 U.S. at 615-16 ("[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.").

II. This Court Should Reject Petitioners' Invitation To Abandon Traditional Forum Analysis.

Petitioners and several of their *amici* urge this Court to subject Section 211B.11(1) to strict scrutiny even though it restricts political speech only in "a polling place," a location long considered a nonpublic forum. *See* Resp. Br. 29-31. This Court should reject that invitation and instead reaffirm the well-settled rule that laws regulating speech—even political speech—in a nonpublic forum are permissible as long as they are reasonable and viewpoint neutral.

A. This Court has consistently applied forum analysis in reviewing First Amendment challenges to laws regulating political speech.

Speech concerning governmental affairs—including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes"—is undoubtedly

essential to a well-functioning democracy and uniquely deserving of First Amendment protection. *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). At the same time, this Court has long acknowledged that the "nature of the forum and the conflicting interests involved" remain "important in determining the degree of protection afforded" by the First Amendment to the particular speech at issue. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974) (plurality opinion).

The degree of scrutiny that a content-based regulation of political speech warrants thus depends on the particular forum in which the regulation applies. Laws that restrict political speech on government property that has long been devoted to public expression are subject to the most exacting scrutiny. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). But laws that restrict political speech only on government property that "is not by tradition or designation a forum for public communication" are subject to a more deferential standard: they will be upheld as long as they are viewpoint neutral and reasonable in light of the purpose served by the forum. *Id.* at 46; *see also Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007).

This Court's precedents foreclose any argument that forum analysis is inappropriate for laws regulating political speech. One of this Court's earliest cases employing forum analysis, *Adderley v. Florida*, involved political speech. 385 U.S. 39, 40-41 (1966). In *Adderly*, the Court upheld the trespass convictions of dozens of college students who engaged in anti-

segregation protests on the property of a county jail. *Id.* at 46-47. The Court squarely rejected the premise of the protestors' First Amendment argument, which was that "people who want to propagandize protests or views have a constitutional right to do so whenever and however they please." *Id.* at 48. "The State, no less than a private owner of property," the Court explained, "has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 47.

A plurality of this Court relied on *Adderley* a few years later in *Lehman*, which upheld a city's policy of prohibiting political advertising on its rapid transit vehicles. 418 U.S. at 303-04 (plurality opinion). The prohibition did not violate the First Amendment because the city, acting in its "proprietary capacity," could legitimately "limit[] access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Id.* at 304. Otherwise, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities would become Hyde Parks open to every would-be pamphleteer and politician." *Id.*

Just two years later, in *Greer v. Spock*, this Court again upheld under forum analysis a regulation of political speech. 424 U.S. 828 (1976). The regulation at issue banned "[s]peeches and demonstrations of a partisan political nature" at Fort Dix Military Reservation, an area over which the federal government exercised exclusive jurisdiction. *Id.* at 830-31. While civilians were "freely permitted to visit unrestricted areas of the reservation," the primary mission of Fort Dix was to "provide basic combat

training for newly inducted Army personnel." *Id.* at 830. The Court rejected as "historically and constitutionally false" the "notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens." *Id.* at 838. To the contrary, "the business of a military installation like Fort Dix" was to "train soldiers, not to provide a public forum." *Id.* The First Amendment therefore did not prevent Fort Dix from "objectively and evenhandedly" applying a policy of "keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind." *Id.* at 839.

Many of this Court's more recent cases applying forum analysis likewise have involved challenges to government regulations implicating political speech. In *Taxpayers for Vincent*, for example, a group supporting a candidate for political office brought a First Amendment challenge to a municipal ordinance that prohibited the posting of signs on public property. 466 U.S. at 792-93. This Court rejected the challenge, finding that the utility poles on which the candidate wished to post signs were a nonpublic forum and that the city's prohibition was reasonable and viewpoint neutral. *Id.* at 814-17. *United States v. Kokinda* involved political volunteers who challenged a U.S. Postal Service regulation that prohibited them from soliciting outside of a post office. 497 U.S. 720, 723-24 (1990). This Court determined that the sidewalk on which the volunteers were soliciting was a nonpublic forum and upheld the regulation as reasonable and viewpoint neutral. *Id.* at 730-37. And in *Arkansas Educational Television Commission v. Forbes*, this

Court concluded that a candidate debate aired on public television was a nonpublic forum and upheld the broadcaster's viewpoint-neutral decision to exclude from the debate a candidate with little popular support. 523 U.S. 666, 676-83 (1998).

Petitioners contend that "[t]he public forum doctrine has never been the *exclusive* analytical device for reviewing speech claims," Pet. Br. 19 (emphasis in original), but none of the cases they cite in support of that proposition involved a regulation of speech in a nonpublic forum. To be sure, the defendant in *Cohen v. California* was convicted of breach of the peace for wearing a "Fuck the Draft" jacket in the corridor of a public courthouse. 403 U.S. 15, 16 (1971). But the statute under which he was convicted "appl[ied] throughout the entire State" and was *not* an attempt to "preserve an appropriately decorous atmosphere in the courthouse." *Id.* at 19. Indeed, *Cohen* reaffirmed that "the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever and wherever he pleases or to use any form of address in any circumstances that he chooses" and noted the government's authority to draw "distinctions between certain locations." *Id.*

Contrary to petitioners' contention, this Court has consistently applied a more deferential standard of review to regulations of speech in a nonpublic forum, even when those regulations draw content-based distinctions and even when they implicate political speech. There is no reason to depart from that settled practice in this case.

B. Forum analysis appropriately takes into account the government's strong interest in preserving government property for its intended use.

The determination that particular speech is protected by the First Amendment "merely begins" the inquiry into whether the government may permissibly restrict that speech. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799 (1985); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677-78 (1992). That is because "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius*, 473 U.S. at 799. In particular, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id.* at 799-800; *see also Perry*, 460 U.S. at 46 ("[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." (internal quotation marks omitted)); *Taxpayers for Vincent*, 466 U.S. at 814 ("[T]he mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted."). Rather, the "Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Cornelius*, 473 U.S. at 800 (quoting *Greer*, 424 U.S. at 836)).

This Court adopted forum analysis "as a means of determining when the Government's interest in

limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry*, 460 U.S. at 49. Although such distinctions may be "impermissible in a public forum," where "all parties have a constitutional right of access," they are "inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Id.* at 49, 55. Accordingly, the purpose of forum analysis is not to devalue any particular category of protected speech; rather, it is to appropriately value the government's proprietary interest in preserving property under its control for its intended use, whether training soldiers, *see Greer*, 424 U.S. at 838; providing postal services, *see Kokinda*, 497 U.S. at 726-30; or facilitating air travel, *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 682.

The limited purpose served by the nonpublic forum at issue in this case—the interior of a polling place—is of course especially important. A polling place exists to allow each voter to communicate "his own elective choice . . . privately—by secret ballot in a restricted space." *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001). As a plurality of this Court recognized in *Burson v. Freeman*, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." 504 U.S. 191, 199 (1992) (plurality opinion) (alteration in original) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). To ensure that the environs of a polling place remain compatible with the limited and important purpose of

that property, all fifty States have enacted laws restricting who may access that property and what expression may occur there. *See Burson*, 504 U.S. at 206 (plurality opinion) (noting that "all 50 States limit access to the areas in or around polling places"); Resp. Br., App. A (compiling text of state polling place restrictions). Forum analysis dictates that these restrictions—even those that implicate core political speech—must be upheld as long as they are reasonable and viewpoint neutral.

C. Subjecting to strict scrutiny all laws regulating political speech in nonpublic forums would significantly interfere with the States' core government operations.

Lower federal courts and state courts have determined that a wide array of properties owned or otherwise controlled by state and local governments qualify as nonpublic forums under this Court's precedents. These properties include the interior of a polling place, *see Marlin*, 236 F.3d at 719 ("the interior of a polling place . . . is not available for general public discourse of any sort"); the interior of a courthouse, *see, e.g.*, *Huminski v. Corsones*, 396 F.3d 53, 91 (2d Cir. 2005) ("The function of a courthouse and its courtrooms is principally to facilitate the smooth operation of a government's judicial functions."); police stations, *see, e.g.*, *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 231 (2d Cir. 1996) (the "police purpose in permitting access [to its bulletin boards] is to promote its own internal objectives"); interrogation rooms, *see, e.g.*, *Carreon v. Ill. Dep't of Human Servs.*, 395 F.3d 786, 797 (7th Cir. 2005) ("It is clear that a room used to interview a

person suspected of committing a crime is not a public forum."); fire stations, *see, e.g.*, *Johnson v. City of Fort Wayne*, 91 F.3d 922, 941 (7th Cir. 1996) (a fire station's purpose, "performing a vital public safety function," is "obviously inconsistent with expressive activity" (internal quotation marks omitted)); and public hospitals, *see, e.g.*, *Low Income People Together, Inc. v. Manning*, 615 F. Supp. 501, 516 (N.D. Ohio 1985) (the "sole purpose" of hospital waiting rooms "is to serve patients, friends and families of patients, and the Hospital staff who provide medical care").

These government properties and others that this Court has previously deemed nonpublic forums, such as prisons, *see*, *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977), are integral to the States' ability to carry out their core government functions. To ensure that these functions are performed as effectively and efficiently as possible, the States must be able to preserve the use of these properties for the important purposes they are intended to serve, including by imposing reasonable and viewpoint-neutral limits on the expressive activities that may occur there. As *Lehman* recognized, were the rule otherwise, these properties "immediately would become Hyde Parks open to every would-be pamphleteer and politician." 418 U.S. at 304 (plurality opinion). The disruption that would ensue from such unfettered expression would significantly impede state and local governments from performing functions and delivering services that are critical to public health and safety. "This the Constitution does not require." *Id.*

III. This Court Should Reject Petitioners' Invitation To Limit *Burson v. Freeman* to Laws Prohibiting Active Electioneering.

In *Burson*, this Court applied traditional forum analysis to uphold a Tennessee statute that created a "campaign-free zone" inside and within 100 feet of polling places on election day. 504 U.S. at 193, 198-211 (plurality opinion). The facial, First Amendment challenge to the statute came from a political campaign worker who sought to communicate with voters in the campaign-free zone outside the polling place. *Id.* at 194. Viewing the streets and sidewalks outside the polling place as a public forum, the *Burson* plurality applied strict scrutiny to test the constitutionality of the statute. *Id.* at 196-98.

The inside of a polling place, on the other hand, is a quintessential nonpublic forum. *See, e.g.*, *Marlin*, 236 F.3d at 719; Resp. Br. 29-32. Petitioners do not dispute that fact. Thus, since the speech regulations in *Burson* survived the strict scrutiny applicable to a public forum, it can only follow that similar regulations would survive the more lenient scrutiny applicable to a nonpublic forum.[2]

To dissuade the Court from this inescapable result, petitioners and their *amici* strain to distinguish *Burson* by, among other things, proposing that there is a dichotomy between restrictions on "active electioneering"—which, they claim, was all that was involved in *Burson*—and the "passive display of

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[2] Justice Scalia made this very point in his concurring opinion in *Burson*. 504 U.S. at 216 (Scalia, J., concurring in the judgment).

speech"—which, they claim, is all that is involved here. Pet. Br. 15-16, 31, 36-37. But the distinction petitioners would like to draw between active and passive speech is unsupportable. Neither the statute at issue in *Burson* nor *Burson*'s analysis was limited to restrictions on active electioneering.

Moreover, this Court's precedents do not support any suggestion that "passive" speech triggers an analysis under a legal standard other than the one applied to "active" speech. *See, e.g.*, *Lehman*, 418 U.S. at 304 (plurality opinion) (applying nonpublic forum analysis to passive display of political speech); *Morse v. Frederick*, 551 U.S. 393, 408-10 (2007) (applying lower level scrutiny to high school student's passive display of message on a banner).

A. The Tennessee law challenged in *Burson* prohibited both active electioneering and the passive display of campaign materials.

The Tennessee law challenged in *Burson*, like the laws of many other States, applied both to active electioneering and to the passive display of campaign materials. Included within its ban on the passive display of campaign materials was a prohibition on the wearing of buttons, caps, pin, shirts, and similar apparel within the statutorily set boundary.

The precise portion of the statute that was challenged as facially invalid under the First Amendment was Tenn. Code Ann. § 2-7-111(b), which provided:

> Within the appropriate boundary as established in subsection (a), and the building in which the

> polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party, or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds of any building in which a polling place is located.

Tenn. Code Ann. § 2-7-111(b)(1) (1990).

Petitioners maintain that *Burson* "did not involve a law restricting citizens' ability to wear political apparel when voting." Pet. Br. 36. Petitioners are incorrect. The statute upheld in *Burson* prohibited the passive display of campaign materials, the active distribution of campaign materials, and the active solicitation of votes, on and inside the polling place and within 100 feet of the polling place. 504 U.S. at 193-94. The dissenting opinion, oral arguments, decision below, and the briefing all confirm that the challenged statute applied to passive displays such as buttons and shirts and was enforced accordingly. *See id.* at 224 (Stevens, J., dissenting) (recognizing the statute applied to the "wearing of campaign buttons"); Oral Arg. Tr., 1991 WL 636253, at *33 , *Burson* (No. 90-1056) ("Tee-shirts and campaign buttons are restricted under this statute." (Statement of Tenn. Att'y Gen. Burson));[3]

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[3] The full exchange between General Burson and Justices Kennedy and O'Connor occurred during General Burson's rebuttal:

> JUSTICE KENNEDY: And what about tee-shirts and campaign buttons?

Freeman v. Burson, 802 S.W.2d 210, 213 (Tenn. 1990) (discussing the "solicitation of votes *and the display* or distribution of campaign materials" (emphasis added)); Br. of Resp. at 3, *Burson*, 504 U.S. 191 (No. 90-1056) (noting the law "even extends to the wearing of caps or shirts with a candidate's name on it").

Thus, petitioners are wrong when they claim that the statute at issue in *Burson* involved only active electioneering and did not involve the passive display of speech. The statute included, on its face, prohibitions on the passive display of speech, such as campaign apparel and buttons. And this Court was cognizant of that fact.

MR. BURSON: Tee-shirts and campaign buttons are restricted under this statute.

JUSTICE KENNEDY: So a voter cannot wear a little campaign button going into --

MR. BURSON: A voter is asked to take the campaign button off as they go in. It's our position -- look, buttons and tee-shirts and hats and signs are all part of campaigning activity. They all implicate and invite the same problems. When you start --

JUSTICE O'CONNOR: And a bumper sticker on a car driving by on the street that happens to fall within the 100-foot limit?

MR. BURSON: Yeah. That is a hypothetical –

Oral Arg. Tr., 1991 WL 636253, at *33-*34, *Burson* (No. 90-1056).

B. *Burson*'s First Amendment analysis was not limited to regulation of active electioneering and did not turn on any distinction between active and passive speech.

Petitioners are equally wrong to claim that *Burson*'s legal analysis was limited to restrictions on active electioneering or that the legal analysis turned on any distinction between active and passive speech.

Burson held that regulations of political speech designed to protect access to the polling place are to be analyzed under the forum doctrine as regulations of government-controlled property. 504 U.S. at 196-97 (plurality opinion). Because, in the view of the plurality, Tennessee's statute regulated traditional public forums, namely public streets and sidewalks adjacent to a polling place, the law was "subject[] to exacting scrutiny." *Id.* at 198. The statute passed muster under that highest level of scrutiny because of the State's compelling interest in protecting its citizens' "fundamental . . . right to cast a ballot in an election free from the taint of intimidation and fraud" and because of the "long history" and "substantial consensus" that political-speech restrictions "around polling places [are] necessary to protect that fundamental right." *Id.* at 211.

Burson's legal analysis was not even remotely predicated or dependent on any distinction between passive speech and active electioneering. Indeed, *Burson* expressly identified the "central concerns" of the First Amendment that the Tennessee statute implicated: "regulation of political speech, regulation of speech in a public forum, and regulation based on the

content of the speech." *Id.* at 196. Nowhere does *Burson* limit its consideration only to regulation of "active campaigning" or electioneering. Pet. Br. 36. The Court simply applied the most stringent scrutiny to a statute that regulated political speech—undifferentiated by "active" versus "passive" manifestation of the expression—and held that the statute did not violate the First Amendment.

Every State has a highly "compelling interest in securing the right to vote freely and effectively." *Id.* at 208. Polling places are, first and foremost, dedicated to allowing voters to cast their ballots in secret, free from coercion, intimidation, and distraction. *Id.* at 206. Their core purpose is to provide a venue in which citizens may exercise their fundamental, constitutional right to vote. *Id.* at 213-14 (Kennedy, J., concurring). For these reasons, Justice Scalia argued in *Burson* that "the environs of a polling place, on election day, are simply not a 'traditional public forum'" and would have applied only intermediate scrutiny. *Id.* at 216 (Scalia, J., concurring in the judgment).

In their struggle to distance themselves from *Burson*, petitioners take the position that there is no compelling interest in regulating "passive" messages displayed on apparel, because passive speech is powerless to disrupt the peace of the polling place, intimidate others, or even influence others. Pet. Br. 15. In essence, petitioners are arguing that the written word is less powerful than the spoken word, that a passively displayed symbol is less powerful than a symbol accompanied by action.

But there is no logic to this argument, and it surely runs counter to common sense; we all know that the

pen is mightier than the sword. The Klansman's hood and the Nazi swastika are symbols that, even when silently displayed, are capable of arousing fear and intimidation. Clearly, "passive" displays of campaign messages can have strong and odious effects. *See, e.g.*, *Lehman*, 418 U.S. at 304 (plurality opinion) (holding that city could prohibit political advertising in streetcars to avoid subjecting riders to the unwelcome "blare of political propaganda"); *Burson*, 504 U.S. at 207 (plurality opinion) ("undetected or less than blatant acts" of intimidation or interference may "drive the voter away").

C. Petitioners' constitutional right to free speech must be reconciled with the State's compelling interest in protecting its citizens' constitutional right to vote.

Burson "present[ed this Court] with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy." 504 U.S. at 198 (plurality opinion). The Court reached reconciliation by holding that Tennessee's "campaign-free-zone" regulation was a constitutionally permissible compromise of the conflict between the right of free speech and the right to vote. *Id.* at 211.

This case should be resolved by the same reconciliation. *Burson* held that Tennessee's statute survived strict scrutiny because its restrictions were "necessary to protect" the "fundamental right . . . to cast a ballot in an election free from the taint of intimidation and fraud." *Id.* at 211. Justice Kennedy concurred in that compromise resolution because "the First Amendment permits freedom of expression to

yield to the extent necessary . . . to protect the integrity of the polling place where citizens exercise the right to vote." *Id.* at 213-14 (Kennedy, J, concurring). Minnesota's statute, which is subject only to the more deferential standard of review applicable to regulations of speech in nonpublic forums, is a reasonable means of protecting the right to vote. *See id.* at 214-16 (Scalia, J., concurring in the judgment) (finding Tennessee's statute a "reasonable" regulation of a nonpublic forum).

Another of this Court's precedents provides an additional factor that, when considered, supports the compromise reached in *Burson* and requires a similar resolution of this case. In *Lehman*, a political candidate challenged on First Amendment grounds a city policy that allowed placard advertisements on the city transit system but prohibited political advertisements. 418 U.S. at 299-301 (plurality opinion). In petitioners' parlance, the candidate sought to exercise his right to political speech through a passive display.[4]

The candidate's challenge was unsuccessful. The plurality opinion emphasized that the Court had "been jealous to preserve access to public places for purposes of free speech," but that it had always looked to "the nature of the forum and the conflicting interests involved . . . in determining the degree of protection afforded by the [First] Amendment to the speech in

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[4] With a message that seems utterly innocuous in today's climate, the candidate's proposed placard contained his likeness and the following copy: "HARRY J. LEHMAN IS OLD FASHIONED! ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT." *Lehman*, 418 U.S. at 299 (plurality opinion).

question." *Id.* at 302-03. Because the forum in question—a public street car—was not an open space and its users were a "captive audience" with their own constitutional interests, the city's regulation of political speech did not violate the First Amendment. *Id.* at 303-04.

Justice Douglas, concurring, elaborated on the conflicting interests at stake. A streetcar is used by "people who because of necessity become commuters and at the same time captive viewers or listeners." *Id.* at 306-07 (Douglas, J., concurring). In his view, the candidate "clearly ha[d] a right to express his views to those who wish[ed] to listen," but "he ha[d] no right to force his message upon an audience incapable of declining to receive it." *Id.* at 307. Commuters' right to be free from forced intrusions on their privacy "preclude[d] the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience," which "has no choice but to sit and listen." *Id.*

The voter in the polling place is just as much, if not more, a captive audience. And her conflicting interest—the right to vote—is certainly as important as, and likely much more important than, a commuter's right to privacy. To exercise her fundamental, constitutional right to vote she "has no choice but" to be in her assigned polling place. She is, thus, the forced recipient of political messages displayed on the shirt or the cap of the voter across the room and on the button sported by the voter next to her in line. She cannot escape the sting of social pressure, intimidation, confusion, or distraction without leaving the polling place and thereby forfeiting her right to vote.

Indeed, the record in this case reveals that petitioners' "Please I.D. Me" buttons were intended to have just such effects on exactly this captive audience. At least part of petitioners' admitted purpose was to bluff voters in the polling place into believing they were legally required to produce IDs or else leave without voting. JA 104-105; Pet. App. D-12 (district court recognizing that "[t]his intimation could confuse voters and election officials and cause voters to refrain from voting because of increased delays or the misapprehension that identification is required").

In short, the reconciliation this Court reached in *Burson*—which, contrary to petitioners' assertions, did take into account individuals' right to display passive political expression—applies equally here. And that reconciliation is easier in this case because the interior of the polling place is a nonpublic forum that people must visit to exercise their fundamental right to vote.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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